21-456

Transcript of Record.

SUPREME COURT OF THE UNITED STATES.

No. ~~398.~~ ~~185~~ 27

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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Cert. 19,

1 To the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of the Baltimore and Ohio Railroad Company respectfully represents:

That a final judgment has been rendered by the court of appeals of Maryland, in a suit therein pending, wherein the State of Maryland is plaintiff, and the Baltimore and Ohio Railroad Company are defendants.

That the court of appeals aforesaid, is the highest court of law in the State of Maryland, in which a decision in the said suit could be had.

That there is drawn in question in said suit, the validity of a statute of the State of Maryland, on the ground of its being repugnant to the Constitution of the United States.

That the said judgment is against the exemption set up or claimed by the said company as appears on the face of the record accompanying this application.

Wherefore, to the end that the said judgment may be re-examined & reversed, or affirmed in the Supreme Court of the United States, upon a writ of error, your petitioners pray that a citation may be issued in the same manner as if the said judgment had been rendered in a circuit court of the United States.

REVERDY JOHNSON,
JNO. H. B. LATROBE,
For Plaintiffs in Error.

2 The within petition is granted, and a writ of error is allowed as therein prayed.

Washington, July 8th, 1872.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court, U. S.

3 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable, the judges of the court of appeals of the State of Maryland, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore and Ohio Railroad Company, appellant, and the State of Maryland, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statue of, or any authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such

4 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Baltimore and Ohio Railroad Company, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the eleventh day of July, in the year of our Lord one thousand eight hundred and seventy-two.

Issued 11th July, 1872.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH P. BRADLEY,
Associate Justice Sup. Court U. S.

5 The United States of America to the State of Maryland, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the court of appeals of the State of Maryland, wherein the Baltimore and Ohio Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this eleventh day of July, in the year of our Lord one thousand eight hundred and seventy-two.

JOSEPH P. BRADLEY,
Associate Justice Sup. C't U. S.

6 On this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared Chauncey F. McCulloh before me, the subscriber, a United States commissioner in and for the district of Maryland, and makes oath that he delivered a true copy of the within citation to Andrew K. Seyster, attorney general of the State of Maryland, on Saturday, July 13th instant, at one o'clock f'rty minutes p. m.

C. F. McCOLLOH.

Sworn to and subscribed the fifteenth day of July, A. D. 1872.

[SEAL.] ISAAC BROOKS JR.,
United States Commissioner in & for the District of Maryland.

7 Know all men by these presents, that the Baltimore and Ohio Railroad Company, and John W. Garrett and John King, jr., are held and firmly bound unto the State of Maryland in the full and just sum of seven hundred thousand dollars, to be paid the said State of Maryland, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents,

sealed with our seals, and dated this tenth day of July, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately in the court of appeals of the State of Maryland, in a suit depending in said court, between the said State of Maryland, plaintiff in the superior court of Baltimore City, and the said Baltimore and Ohio Railroad Company, defendants, and carried on an appeal to the said court of appeals, judgment was rendered against the said company; and the said Baltimore & Ohio Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Maryland, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Baltimore and Ohio Railroad Company shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) JOHN W. GARRETT, [L. S.]
President.
(S'g'd) JOHN KING, JR. [L. S.]
(S'g'd) JOHN W. GARRETT, [L. S.]

Sealed and delivered in presence of—
(S'g'd) JNO. H. B. LATROBE.
(S'g'd) WM YARDLEY.

Approved by—

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court.

8 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland begun and held for e said State, at the city of Annapolis on the first Monday in April, it ing the third day of the said month in A. D. one thousand eight hun- d and seventy-one, and of the Independence of the United States of erica the ninety-fifth—

resent, the Honorable James L. Bartol, chief judge; James O. art, John M. Robinson, Richard H. Alvey, Oliver Miller, William P. lsby, George Brent, Richard Grason—

mong other were the following proceedings, to wit:

9 THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that, now here, on the first Monday in October, being the third day of the said month, in the year of our Lord 1870, the judge of the superior court of Baltimore City, being in the eighth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmitted to the court of appeals here the record of proceedings of a plea which was lately
10 depending before him in the superior court of Baltimore City, between the State of Maryland, plaintiff, and the Baltimore and Ohio Railroad Company, defendant; and wherein the said superior court gave judgment for the said The Baltimore and Ohio Railroad Company against the said The State of Maryland, and from which said

judgment the said The State of Maryland appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

11 In the superior court of Baltimore City.

THE STATE OF MARYLAND, PLAINTIFF,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, defendant. } In the superior court of Baltimore City.

Isaac D. Jones, I. Nevitt Steele, Philip Francis Thomas, S. Teackle Wallis, attorneys for plaintiff; Reverdy Johnson, John H. B. Latrobe, Randolph Tucker, Charles J. M. Gwinn, attorneys for defendant.

Action commenced May 6, 1870. Writ of summons issued returnable to May term, 1870.

Declaration and notice.—Filed May 6, 1870.

BALTIMORE CITY, *to wit:*

The State of Maryland, by Isaac D. Jones, attorney-general of the said State, I. Nevitt Steele, Philip Francis Thomas, and S. Teackle Wallis, its attorneys, sues the Baltimore and Ohio Railroad Company:

For money due and payable by the defendant to the plaintiff; for money had and received by the defendant for the use of the plaintiff.

And the plaintiff claims damages, $500,000.

ISAAC D. JONES,
Att'y-Gen'l of Maryland,
I. NEVITT STEELE,
PHILIP FRANCIS THOMAS,
S. TEACKLE WALLIS,
For Plaintiff.

To the defendant:

Take notice that, on the day of your appearance to this action in the superior court of Baltimore City, a rule will be entered requiring you to plead to the said declaration within fifteen days thereafter.

ISAAC D. JONES,
Att'y-Gen'l of Maryland,
I. NEVITT STEELE,
PHILIP FRANCIS THOMAS,
S. TEACKLE WALLIS,
For Plaintiff.

12 *Bill of particulars.—Filed 8th July, 1870.*

In the superior court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Original to May, 1870.

The plaintiff, in answer to the demand of the defendant for a bill of particulars, says that its said claim is for the particulars following, viz:

For five hundred thousand dollars, ($500,000,) being the one-fifth

part of the whole amount of moneys received by the defendant for the transportation of passengers upon the Washington Branch of the Baltimore and Ohio Railroad, from the first day of January, 1860, to the first day of January, 1870; which said sum of five hundred thousand dollars was received by the defendant for the use of the plaintiff, and was due and in arrears to the plaintiff at the time of the institution of this action.

ISAAC D. JONES,
Att'y-Gen'l of Md.,
I. N. STEELE,
P. F. THOMAS,
S. TEACKLE WALLIS,
Plff's Attorneys.

Pleas.—Filed 23d November, 1870.

In the superior court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

The defendants, by their attorneys, says that they never were indebted as alleged by the plaintiff.

And for a second plea, they say that the plaintiff is indebted to the defendants in an amount equal to the plaintiff's claim for money paid for and on account of the said plaintiff, and at its special instance and request; which amount the defendants are willing to set off against the plaintiff's claim, and the defendants file herewith the account on and by which they allege that the said plaintiff is so indebted to the defendants.

C. J. M. GWINN,
JNO. H. B. LATROBE,
REVERDY JOHNSON,
For Def'ts.

Account referred to in the foregoing plea of set-off.—(Filed with plea 23d Nov., 1870.)

The State of Maryland in account with the Baltimore and Ohio Railroad Company.

DR.

	April	30.	To interest paid from 7th Nov., 1840, by the B. & O. R. R. Co.	$12,073 23
	July	31.	" " " " " " "	11,722 68
	Oct'r	20.	" " " " " " "	22,656 47
	Dec'r	20.	" State tax	1,590 68
1850.	April	20.	" cash paid Dennis Claude, treasurer State of Maryland, on £7,000	847 00
	April	20.	" interest paid £198,250	22,137 39
	Aug.	20.	" State tax	2,161 66
	Oct'r	20.	" cash paid D. Claude, treasurer, on £7,000	747 00
	Oct'r	20.	" interest on £198,250	25,503 17
1851.	April	20.	" cash paid on £7,000	847 00
	April	15.	" interest on £198,250	25,390 14
	July	1.	" remittance of £2,838 1. 3, exchange at 10¼ per cent	13,938 03
	Aug.	5.	" " per A. Brown & Sons	3,400 43
	Oct'r	3.	" payment to State on £32,000	3,879 00
	Oct'r	13.	" " " 25,000, 3 months	1,512 50
	Oct'r	13.	" interest upon £688,000	72,688 44
	Dec'r	13.	" State tax	2,451 25
1852.	April	6.	" " interest on £57,000	6,897 00
	April	15.	" interest on £663,000	72,634 18
	Oct'r	5.	" State's interest on £57,750	7,078 50
	Oct'r	14.	" interest remitted on £662,250	82,122 68
	Dec'r	23.	" State tax	7,220 07
1853.	April	4.	" interest on £59,500	7,834 75

	April	18.	"	remittance of interest on £660,500	75,753 39
	Oct'r	4.	"	State's interest on £60,500	7,320 50
	Oct'r	18.	"	interest remitted on £659,500	81,431 91
1854.	April	5.	"	State's interest on £74,500	9,014 50
	April	14.	"	interest remitted on £645,500	78,535 83
	May	30.	"	State tax on sterling bonds	4,315 71
	Oct'r	3.	"	State's interest on £75,250	9,105 25
	Oct'r	17.	"	interest remitted on £644,750	75,117 02
1855.	April	5.	"	State's interest on £78,250	9,462 25
	April	16.	"	interest remitted on £641,750	71,512 61
	Oct'r	3.	"	interest on £78,250, in Annapolis	9,462 25
	Oct'r	15.	"	" 641,750, in London	78,960 55
1856.	April	3.	"	" 82,250, in Annapolis	9,952 25
	April	17.	"	" 637,750, in London	75,596 71
	Oct'r	5.	"	" 83,750, in Annapolis	10,131 75
	Oct'r	15.	"	" 636,250, in London	78,801 05
	Nov.	19.	"	State tax	2,732 14
1857.	April	2.	"	interest, in Annapolis, on £105,500	12,765 50
	April	17.	"	" London, " 614,500	72,627 19
	Oct'r	2.	"	" Annapolis, " 128,250	15,276 25
	Oct'r	19.	"	" London, " 593,750	73,294 94
1858.	April	5.	"	" Annapolis, " 126,250	15,276 25
	April	20.	"	" London, " 593,750	70,014 17
	Sept.	30.	"	State tax for 1856, 1857, and 1858	8,000 12
	Oct'r	4.	"	interest, in Annapolis, on £128,000	15,488 00
	Oct'r	20.	"	" London, " 592,000	72,746 93
1859.	April	2.	"	" Annapolis, " 133,250	16,123 25
	April	15.	"	" London, " 586,750	69,567 00
	Oct'r	3.	"	" Annapolis, " 133,250	16,123 25
	Oct'r	13.	"	" London, " 586,750	71,521 67
1860.	April	3.	"	" Annapolis, " 143,750	17,393 75
	April	17.	"	" London, " 576,250	67,950 82
	Sept.	5.	"	State tax	4,920 70
	Oct'r	4.	"	interest, payable in Annapolis, paid on £145,250	17,575 25
	Oct'r	8.	"	" " " London, " 574,750	70,656 77
1861.	April	2.	"	" " " Annapolis, " 154,750	18,724 75
	April	9.	"	" " " London, " 565,250	66,098 10
	Oct'r	3.	"	" " " Annapolis, " 160,750	19,450 75
	Nov.	22.	"	" " " London, " 559,250	70,556 88
1862.	April	3.	"	" " " Annapolis, " 185,250	22,415 25
	April	22.	"	" " " London, " 534,750	67,800 10
	Oct'r	10.	"	" " " Annapolis, " 183,250	21,742 79
	Nov.	13.	"	" " " London, " 534,750	79,536 66
1863.	April	3.	"	" " " Annapolis, " 183,750	20,486 21
	June	10.	"	" " " London, " 536,250	95,879 09
	Oct'r	5.	"	" " " Annapolis, " 186,250	22,536 25
	Nov.	14.	"	" " " London, " 533,750	98,500 44
	Dec'r	22.	"	taxes on sterling bonds for 1861, 1862, and 1863	13,352 90
1864.	April	11.	"	interest, paid in Annapolis, on £186,250	22,536 25
	June	11.	"	" " " London, " 533,750	123,705 53
	Oct'r	5.	"	" " " Annapolis, " 196,000	23,716 00
	Dec'r	27.	"	" " " London, " 524,000	214,850 00
1865.	April	5.	"	" " " Annapolis, " 196,000	23,716
	June	7.	"	" " " London, " 524,000	88,369
					$2,916,03
1865.	July	1.	To balance due the B. & O. R. R. Co. by the State of Maryland		$289,5

CR.

1849.	March	1.	By interest to July 1st, 1842, 2½ years, on £5,250 sold		$A,
	July	1.	" " " 7 " " £5,250 "		
	April	11.	" " " 1849, 2 months and 19 days, on £200,000		
1850.	Jan'y	1.	By 6 months interest to 1st of January, 1850, on £205,250		
	July	1.	" " " " July, 1850, on £205,250		
	Aug.	31.	By £8,500 sold, 4 months' interest to January 1st, 1851	$708 33	
	Nov.	23.	" 1,750 " 1 month and 8 days' interest to January 1st, 1851	46 69	
	Dec.	17.	" 500 " 14 days to January 1st, 1851	4 85	
1851.	Jan'y	1.	" 205,250 " 6 months' interest to January 1st, 1851	25,656 25	
					26,4
1851.	Jan'y	1.	" £216,000		
	Jan'y	4.	By 3,250 sold, interest, 5 months 26 days, to 1st of July, 1851	$397 47	
	Jan'y	25.	" 8,000 " " 5 " 5 " " " "	861 10	
	Feb.	8.	" 4,750 " " 4 " 22 " " " "	468 39	
	Mar.	10.	" 20,000 " " 3 " 20 " " " "	1,527 77	
	April	10.	" 50,000 " " 2 " 20 " " " "	2,777 78	
	May	3.	" 12,500 " " 1 " 7 " " " "	321 18	
	June	13.	" 12,500 " " 17 days to 1st of July 1851	147 56	
	June	30.	By £327,000		
	June	30.	" interest 6 months on £216,000 to 1st July, 1851	27,000 00	
					33,501 25
	July	1.	By £12,500 sold, interest 6 months to 1st of January, 1852	1,562 50	
	July	2.	" 25,000 " 6 " " " "	3,125 00	
	July	9.	" 12,500 " 5 " 22 days to 1st of January, 1852	1,493 07	

July	15.	"	12,500	"	5½	"	to 1st of January, 1852.....			1,432 29	
July	15.	"	6,250	"	5½	"	" "			716 14	
Aug.	1.	"	6,250	"	5	"	" "			651 03	
Aug.	4.	"	5,000	"	4	"	27 days to 1st of January, 1852..			510 42	
Aug.	5.	"	12,500	"	4	"	26 " " ..			1,267 36	
Aug.	8.	"	12,500	"	4	"	23 " " ..			1,241 35	
Aug.	15.	"	12,500	"	4	"	16 " " ..			1,180 65	
Aug.	25.	"	12,500	"	4	"	6 " " ..			1,093 75	
Sep.	1.	"	12,500	"	4	"	to 1st of January, 1852.....			1,041 67	
Sep.	3.	"	12,500	"	3	"	28 days to 1st of January, 1852..			1,024 33	
Sep.	10.	"	12,500	"	3	"	21 " " ..			963 54	
Sep.	15.	"	12,500	"	3	"	16 " " ..			920 14	
Oct'r	1.	"	25,000	"	3	"	to 1st of January, 1852.....			1,562 50	
Oct'r	7.	"	12,500	"	2	"	24 days to 1st of January, 1852..			729 16	
Oct'r	11.	"	12,500	"	2	"	20 " " ..			794 44	
Oct'r	13.	"	25,000	"	2	"	18 " " ..			1,354 17	
Oct'r	13.	"	12,500	"	2	"	18 " " ..			677 08	
Oct'r	20.	"	12,500	"	2	"	11 " " ..			616 31	
Nov.	5.	"	12,500	"	1	"	26 " " ..			486 11	
Nov.	10.	"	12,500	"	1	"	21 " " ..			442 69	
Nov.	21.	"	12,500	"	1	"	10 " " ..			347 24	
Nov.	21.	"£644,500									
Dec'r.	31.	" interest on £327,000, 6 months, to 1st of January, 1852.....								40,875 00	
											66,007 94
1852. Feb.	6.	" £12,500 sold, interest, 4 months 24 days, to 1st of July, 1852.....								1,249 98	
Feb.	19.	"	12,500	"	4	"	11 " "			1,137 15	
Mar.	15.	"	12,500	"	3	"	15 " "			911 45	
April	15.	"	38,000	"	2	"	15 " "			1,979 16	
April	15.	"£720,000									
June	30.	" interest on £644,500, 6 months, to July 1, 1852.....								80,562 50	
											85,840 24
1853. Jan'y	1.	" interest (*) on £720,000 for 6 mo's, from 1st July, 1852, to 31st December, 1852.									90,000 00
July	1.	" " " " " 1st January, 1853, to 30th June, 1853.									90,000 00
1854. Jan'y	1.	" " " " " 1st July, 1853, to 31st December, 1853.									90,000 00
July	1.	" " " " " 1st January, 1854, to 30th June, 1854..									90,000 00
1855. Jan'y	1.	" " " " " 1st July, 1854, to 31st December, 1854.									90,000 00
July	1.	" " " " " 1st January, 1855, to 30th June, 1855..									90,000 00
1856. Jan'y	1.	" " " " " 1st July, 1855, to 31st December, 1855.									90,000 00
July	1.	" " " " " 1st January, 1856, to June 30th, 1856..									90,000 00
1857. Jan'y	1.	" div., (†) semi-an., at 6 % for 6 mo's, from July 1st, 1856, to 31st Dec., 1856...									90,000 00
July	1.	" " " " " Jan. 1st, 1857, to 30th June, 1857...									90,000 00
1858. Jan'y	1.	" " " " " July 1st, 1857, to 31st Dec., 1857...									90,000 00
July	1.	" " " " " Jan. 1st, 1858, to 30th June, 1858...									90,000 00
1859. Jan'y	1.	" " " " " July 1st, 1858, to 31st Dec., 1858...									90,000 00
July	1.	" " " " " Jan. 1st, 1859, to 30th June, 1859...									90,000 00
1860. Jan'y	1.	" " " " " July 1st, 1859, to 31st Dec., 1859....									90,000 00
July	1.	" " " " " Jan. 1st, 1860, to 30th June, 1860...									90,000 00
1861. Jan'y	1.	" " " " " July 1st, 1860, to 31st Dec., 1860...									90,000 00
July	1.	" " " " " Jan. 1st, 1861, to 30th June, 1861...									90,000 00
1862. Jan'y	1.	" " " " " July 1st, 1861, to 31st Dec., 1861...									90,000 00
July	1.	" " " " " Jan. 1st, 1862, to 30th June, 1862...									90,000 00
1863. Jan'y	1.	" " " " " July 1st, 1862, to 31st Dec., 1862...									90,000 00
July	1.	" " " " " Jan. 1st, 1863, to 30th June, 1863...									90,000 00
1864. Jan'y	1.	" " " " " July 1st, 1863, to 31st Dec., 1863...									90,000 00
July	1.	" " " " " Jan. 1st, 1864, to 30th June, 1864...									90,000 00
1865. Jan'y	1.	" " " " " July 1st, 1864, to 31st Dec., 1864...									90,000 00
July	1.	" " " " " Jan. 1st, 1865, to 30th June, 1865...									90,000 00
		" balance due the Baltimore and Ohio Railroad Co. by the State of Maryland.									289,529 65
											$2,916,037 91

STATE OF MARYLAND,
Baltimore City:

Before the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore City, personally appeared, on this twenty-second day of January, 1870, John King, j'r, vice-president of the Baltimore and Ohio Railroad Company, and made oath on the Holy Evangely of Almighty God that the State of Maryland is indebted to the said Baltimore and Ohio Railroad Company in the full and just sum of two hundred and eighty-nine thousand five hundred and twenty-nine dollars and sixty-five cents, with interest from the first day of July, 1865, as charged in the foregoing account for money paid for and on account of the said

(*) This being the equivalent in sterling five per cent. bonds issued by the State under the act of April 5th, 1839, to pay its $3,000,000.00 subscription.

(†) Semi-annual dividend at the rate of six per cent. per annum on $3,000,900.00, payable to the State of Maryland under the act of 1839, Ch. 395, S. 9.

State of Maryland, and that the said Baltimore and Ohio Railroad Company has not, directly or indirectly, nor hath any person for it, to his knowledge, received any payment or satisfaction for the same more than credit is duly given for in said account. And at the same time, also, personally appeared William H. Ijams, treasurer of the said Baltimore and Ohio Railroad Company, and also made oath on the Holy Evangely of Almighty God that the said State of Maryland is indebted to the said Baltimore and Ohio Railroad Company in the full and just sum of two hundred and eighty-nine thousand five hundred and twenty-nine dollars and sixty-five cents, with interest from the first day of July, 1865, as charged in the foregoing account, for money paid for and on account of the said State of Maryland, and that the said Baltimore and Ohio Railroad Company has not, directly or indirectly, nor hath any person for it, to his knowledge, received any payment or satisfaction for the same more than credit is duly given for in said account.

Sworn before me.

W'M BONE, *J. P.*

14 *Joinder of issue to first plea, and demurrer to second plea.—Filed 28 November, 1870.—And issue joined in demurrer.*

In the superior court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMpany. } Nar. and pleas.

The plaintiff joins issue upon the defendant's first plea.

And as to the defendant's second plea, the plaintiff saith that the facts set forth in the said plea are insufficient in law to be replied unto.

I. N. STEELE,
S. T. WALLIS,
P. F. THOMAS,
I. D. JONES, *Att'y Gen'l,*
Attorneys for Plaintiff.

Agreement of counsel.—Filed 1st December, 1870.

In the superior court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMpany.

It is agreed that, in all the stages of the above cause, and in all the courts in which it may come under discussion, the acts of assembly relating to the defendant, may be read from the printed volume of the laws, as though the same were duly proved according to law, and the plaintiff may read any documents that have been printed in this connection by the Baltimore and Ohio Rail' Company.

ISAAC D. JONES, *Att'y Gen'l,*
I. N. STEELE,
PHILIP F. THOMAS,

JOHN H. B. LATROBE,
R. JOHNSON,
For Def'ts.

Demurrer to second plea sustained by the court 2nd December, 1870.

5TH DECEMBER, 1870.—Jury sworn and verdict for the defendant and judgment inde.

Bill of exceptions.—Filed 16 *January*, 1871.

In the superior court of Baltimore City.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

At the trial of this cause the plaintiff, to sustain the issue on its part, offered in evidence the acts of the general assembly of Maryland containing the charter of the defendant, all of the acts of assembly relating to the construction of a railroad between the
15 cities of Washington and Baltimore, and to the payment to the plaintiff by the defendant of one-fifth part of the whole amount which may be received by it from the transportation of passengers on the said branch road, together with all other the acts of assembly of Maryland applicable in the premises, (which said acts of assembly it was agreed should be read from the statute-book, on appeal, as if inserted herein;) also offered evidence tending to show the acceptance by the defendant of all said acts proper or necessary to be by it accepted; and further proved the acceptance and completion of said branch road, and its having been put into full operation under said acts of assembly, in the year 1835; and also offered in evidence statements made from the books of the defendant, showing the said whole amount of money so received by the defendant for the transportation of passengers, and the portion thereof paid by the defendant to the State, on account of the said one-fifth, during the period covered by the bill of particulars in this cause, as follows:

Statements from the books of the defendants.

No. 1.

As it was the practice during the continuance of the war to credit the accounts of earnings of main line and branches respectively, with the full amounts represented by the accounts rendered to the Government as having been earned by the roads respectively, and as large deductions were made by the Government from such accounts as were examined and paid by it, and large accounts for service rendered remained unpaid at the close of the fiscal year of 1865, which it was estimated would be reduced by the amount of $600,000 when paid, and as the deductions could not be charged back to the respective earnings of the road and branches until finally acted upon by the Government, it was adjudged proper, basing the estimate upon the average deductions which had previously been made by the Government, that out of the account which were estimated as revenue of the road and branches, for the year ending September, 1865, the sum of $600,000 should be suspended for the reason above stated, and that the same should be apportioned as a deduction from the estimated earnings of the main line and branches, as follows, viz:

To the passenger revenue of the main line	$204,000
" " ton'age " " " "	99,000
" " passenger " " Parkersburg branch	100,000
" " ton'age " " " "	25,000
" " passenger " " Washington "	60,000
" " ton'age " " " "	15,000
To the passenger revenue accruing to the main line for the use of that portion of the same, between Baltimore and the Relay-House	76,000
To the ton'age revenue accruing to the main line for the use of that portion of the same between Balto. and the Relay-House	21,000

And it was ordered that, upon final adjustment of the Government accounts, the earnings of the main line and branches should receive credits for any amounts which might be found due to the roads respectively, and should receive a debit for any amount which, over and above the amount thus apportioned, it should be found was properly chargible to them respectively. All of which credits and debits were made as the accounts were adjusted with the Government.

16 STATEMENT No. 2.

Statement of the payments made by the Baltimore and Ohio Railroad Co. to the State of Maryland for $\frac{1}{5}$ of the gross receipts on the Washington branch.

June, 1860	$40,847 54
Dec., "	40,926 77
June, 1861	39,919 94
Dec., "	79,218 08
June, 1862	80,565 92
Dec., "	97,264 01
June, 1863	110,276 50
Dec., "	101,256 00
June, 1864	118,130 12
Dec., "	118,934 32
June, 1865	153,208 66
Dec., "	120,682 54
June, 1866	85,477 30
Dec., "	80,779 89
June, 1867	74,041 39
Dec., "	78,240 29
June, 1868	69,577 25
	$1,489,344 53
	250,000 00 on acc. of military.
L. H. D.	$1,739,344 53

Period.	Total commercial revenue.	Drawbacks.	Net revenue.	State's 1-5.
June, 1860	$204,237 74	.....	$204,237 74	$40,847 55
Dec., 1860	204,633 87	.....	204,633 87	40,926 77
June, 1861	199,593 46	42 40	199,551 06	39,910 21
Dec., "	396,090 65	2,029 33	394,061 32	78,812 26
June, 1862	402,709 93	893 40	401,816 53	80,363 31
Dec., "	486,473 79	796 48	485,677 01	97,135 40
June, 1863	551,403 81	279 39	551,124 42	110,224 88
Dec., "	506,286 47	136 27	506,150 20	101,230 04
June, 1864	603,372 15	117 21	603,254 94	120,650 99
Dec., "	597,679 45	858 37	596,831 08	119,364 22
June, 1865	769,479 88	2,253 61	767,226 27	153,445 25
Dec., "	607,095 51	2,464 97	604,630 54	120,926 11
June, 1866	428,703 29	2,326 63	426,376 66	85,275 33
Dec., "	405,111 35	1,668 39	403,443 26	80,688 65
June, 1867	376,294 75	5,113 70	371,181 05	74,236 21
Dec., "	393,736 74	3,288 97	390,447 77	78,089 56
June, 1868	351,484 31	3,603 96	347,880 35	69,576 07
Dec., "	379,722 15	1,723 76	377,998 39	75,599 68
June, 1869	412,908 47	4,090 43	408,818 04	81,762 61
Dec., "	387,704 40	2,887 14	384,817 26	76,963 45
	$8,664,722 47	$34,574 71	$8,630,147 76	$1,726,029 55
Amount paid as per statement here				$1,489,344 53
				$236,685 02
Add military, $1,650,932 09½, 1-5 of			$330,186 41	
Less paid June 10, '65		$100,000 00		
Oct. 12, '65		100,000 00		
Sept. 24, '67		50,000 00		
			$250,000 00	
				$80,186 41
January 1, '70, remaining unpaid				$316,871 43

J. H. D.

17

STATEMENT No. 3.

State's $\frac{1}{5}$th, from Jan., 1860, to June 30, 1868	$1,821,189 63
Amount paid	1,528,644 61
Balance	$292,545 02
34,657.66 overpaid for June, 1861	$34,657 66
Underpaid, Dec'r., 1861	$41,917 65
	$7,259 99
" June, 1862	16,592 25
" Dec'r, "	61,432 26
" June, 1863	20,006 87
" Dec'r, "	32,186 32
" June, 1864	49,524 13
" Dec'r, "	44,537 15
" June, 1865	46,829 22
" Dec'r, "	9,578 24
" June, 1856	1,384 02
" Dec'r, "	847 03
" June, 1867	1,143 72
" Dec'r, "	936 35
" June, 1868	287 47
Balance, without interest, to June 30, '68	$292,545 02
State's $\frac{1}{5}$, from Jan., 1860, to June 30, 1868	$1,821,189 63

Amount claimed to have been paid.....	1,739,344 53
Balance due without interest.....	$81,845 10

STATEMENT No. 4.

1860. June.	Com'l earnings,	State's $\frac{1}{5}$th.....	$40,847 55			
		Amount p'd.....	40,847 55			
" Dec'r.	" "	State's $\frac{1}{5}$.....	40,926 77			
		Amount p'd.....	40,926 77			
1861. June.	" "	State's $\frac{1}{5}$.....	39,910 21			
		Am't p'd.....	29,917 94			7 73
" Dec'r.	" "	State's $\frac{1}{5}$.....	78,812 26			
		Am't p'd.....	79,218 08			405 82
1862. June.	" "	State's $\frac{1}{5}$.....	80,363 31			
		Am't p'd.....	80,565 92			202 61
" Dec'r.	" "	State's $\frac{1}{5}$.....	97,135 40			
		Am't p'd	97,264 01			128 61
1863. June.	" "	State's $\frac{1}{5}$.....	110,224 88			
		Am't p'd.....	110,276 50			51 62
" Dec'r.	" "	State's $\frac{1}{5}$.....	101,230 04			
		Am't p'd.....	101,256 01			25 97
18						
1864. June.	Com'l earnings,	State's $\frac{1}{5}$.....	120,650 99			
		Am't p'd.....	118,130 12			2,520 87
" Dec'r.	"	State's $\frac{1}{5}$.....	119,364 22			
		Am't p'd.....	118,934 32			429 90
1865. June.	" "	State's $\frac{1}{5}$	153,445 25			
		Am't p'd.....	153,208 66			236 59
" Dec'r.	" "	State's $\frac{1}{5}$.....	120,926 11			
		Am't p'd.....	120,682 54			243 57
1866. June.	" "	State's $\frac{1}{5}$.....	85,275 33			
		Am't p'd.....	85,477 30			201 97
" Dec'r.	" "	State's $\frac{1}{5}$.....	80,688 65			
		Am't p'd.....	80,779 89			91 24
1867. June.	" "	State's $\frac{1}{5}$.....	74,236 21			
		Am't p'd.....	74,041 39			194 82
" Dec'r.	" "	State's $\frac{1}{5}$.....	78,089 56			
		Am't p'd.....	78,240 29			150 73

1868. June.	" "	State's $\frac{1}{5}$.....	69,576 07
			69,577 25
			1 18

Over-payments.—June, 1861		$7 73
Dec'r, "		405 82
June, 1862		202 61
Dec'r, "		128 61
June, 1863		51 62
Dec'r, "		25 97
June, 1866		201 97
Dec'r, "		91 24
Dec'r, 1867		150 73
June, 1868		1 18
		$1,267 48
Under-payments.—1864. June		$2,520 87
" Dec'r		429 90
1865. June		236 59
" Dec'r		243 57
1867. June		194 82
		$3,625 75
Less over-payments		1,267 48
Amount still due		$2,358 27

19 STATEMENT No. 5.

State's $\frac{1}{5}$ of commercial revenue from Jan'y 1, '60, to Jan'y 1, '70			$1,726,029 55
Less 3 semi-ann'l instalments, subsequent to June 30, '68.			234,326 74
			$1,491,702 81
Amount paid to the State			1,489,344 53
Balance due			$2,358 28
State's $\frac{1}{5}$ of military earnings, less amount suspended		$330,186 41	
Amount p'd, viz:			
1865. June 10th	$100,000		
" Oct. 12	100,000		
1867. Sept. 24	50 000		
		250,000 00	
			80,186 41
			$82,544 69
State's $\frac{1}{5}$, 6 mo's ending Dec. 31, 1868		$75,599 68	
" " to June 30, '60		81,763 61	
" " " Dec. 31, '69		76,963 45	
			$234,326 74
			$316,871 43

Earnings for six mo's ending June 30, '70	$368,259 14
Less drawbacks	3,838 51
	5)364,420 63
State's $\frac{1}{5}$	$72,884 13

And the plaintiff then further offered evidence showing that the fare charged and received by the defendant for said transportation of passengers on said branch-road, during the period of time covered by the bill of particulars in this cause, was one dollar and fifty cents for each passenger, between the cities of Washington and Baltimore, and at the same rate for shorter distances.

And the plaintiff further proved that the president of the defendant, from the time of the completion of the said branch road, had annually rendered an account purporting to show the gross amount received by defendant for the transportation of passengers on said road and the State's proportion thereof, down to the first of January, 1868, and that the defendant had made semi-annual payments, in January and July of each year, on account of the same, to the treasurer of Maryland, down to the 1st of July, 1868.

And thereupon the case of the State having been closed, the defendant, by leave of the court, and under the thirty-third rule thereof, (to be inserted hereafter in this bill of exceptions,) offered the two prayers following, viz:

Defendants' prayer.

The defendants, by their counsel, pray the court to instruct the *the* jury as follows:

First. That the act of assembly of 1832, chap. 175, and the act of assembly of 1836, chap. 261; 1844, chap. 103; 1845, chap. 370, and 1852, chap. 328, which have been offered in evidence, so far as they provide that the defendants shall pay to the treasurer of the western shore of Maryland, on the first Monday of January and July in each and every year, for the use of the State, one-fifth of the whole amount that may be received for the transportation of passengers on the branch-road mentioned in said acts during the six months last preceding, are unconstitutional, because in conflict with the Constitution of the United States. Granted.

Second. That the fact that the said defendants have charged and received one dollar and fifty cents for the transportation of passengers for the whole distance, over the branch road aforesaid, and the fact that the defendants, up to the 30th day of June, 1868, have accounted with and paid to the treasurer one-fifth of the gross receipts from passengers on said road, do not estop the said defendants from denying the constitutionality of said acts, and that the plaintiff is not entitled to recover. Granted.

And the plaintiff offered the two prayers following, viz:

Plaintiff's prayers.

1. The plaintiff prays the court to instruct the jury, that even if the act of assembly of 1832, ch. 175, as modified by the subsequent acts of assembly offered in evidence, is held to impose a tax on passengers

travelling on the Washington Branch Road, and to be therefore unconstitutional under the Constitution of the United States, still the plaintiff is entitled to recover under its count for money had and received, as explained by the bill of particulars, one-fifth of the gross amount which the jury shall find to have been received by the defendant for the transportation of passengers upon the Washington Branch Road, and not already paid over by the defendant to the plaintiff. Rejected.

2d. The plaintiff prays the court further to instruct the jury, that if they shall find from the evidence that the defendant accepted the terms of the several acts of assembly read in evidence, relating to the rate of fare for the transportation of passengers on its road between the cities of Baltimore and Washington, and relating to the payment to the State of one-fifth of the said fare, and that the defendant, between the 31st day of December, 1859, and the 31st day of December, 1869, received for the said transportation any sum of money, then the plaintiff is entitled to recover in this action one-fifth of the sum which the jury may so find to have been received, and which has not already been paid to the plaintiff, without regard to any question of conflict between the said acts or any of them, and the Constitution of the United States. Rejected.

And after argument had upon the said four prayers, the defendant offered the following prayer:

Defendant's 3d prayer.

Counsel for the defendants prays the court to instruct the jury that, if the defendants, before the act of July, 1868, and ever thereafter *decreed* the right of the State to one-fifth of the gross receipts from passengers on the Washington road, upon the ground that the acts of assembly which purport to give the plaintiff a right to such one-fifth, are unconstitutional, and that, from the 1st of July, 1868, to the 31st of sai[illegible]ember, 1869, they have received such amount as due to themselves ment[illegible] their charter, that then the law does not imply a contract to pay so forth[illegible]e when received to the State—the defendants, upon the hypothes[illegible]is prayer, not having received said sum as the agent of the bei[illegible]te, or for or on her own account, but as due to themselves.

21 1871, the reception and granting of which, the plaintiff objected said, by[illegible]ing, as follows:

proceeding[illegible]

as [illegible]atters a*Plaintiff's objection to defendant's 3d prayer.*
error assigned, bei[illegible]
derstood, and matur[illegible]e superior court of Baltimore City.
to the court of appea[illegible]

ceedings aforesa[illegible]F MARYLAND
28½ said; therefore, it
judgment aforesaid RAILROAD COMPANY.

are hereby, reversed, and [illegible]

It is also considered by[illegible]he reception and consideration of the defend-
Maryland recover against [illegible]me, as inadmissible under the 33d rule of
Company the sum of thirty-s[illegible]ordinarily require that the whole of the evi-
superior court of Baltimore [illegible]ed by plaintiff and defendant, shall be
thirty-nine dollars and eighty-[illegible]ade to the court for its instruction thereon.
by the court here adjudged [illegible] plaintiff's case shall have been closed, the
its assent, for its cost [illegible]quire the defendant to submit a prayer or
29 about the prosecution of [illegible] the plaintiff to recover, and the extent of
The State of Maryland [illegible]
of appeals filed the following o[illegible]egoing is a true copy of the 33d rule for

the conduct of business in the said superior court, and that, at the time of the trial of this cause, it was in force.

GEORGE W. DOBBIN,
Judge of the Superior Court of Baltimore City.

The case being now before the court altogether upon the plaintiff's right to recover on its proof, and case made:

The plaintiff further objects to the prayer itself, not only because of error in the proposition of law which it asserts, but because there is, and is admitted to be no evidence in the case to support the hypothesis of fact which it assumes.

I. D. JONES, *Att'y Gen'l.*,
I. N. STEELE,
P. F. THOMAS,
S. T. WALLIS,
For Plaintiff.

Whereupon the court granted the first and second prayers of the defendant, and rejected the prayers of the plaintiff, and the defendant then withdrew his said third prayer.

And the plaintiff thereupon asked leave to except to the granting of the two said prayers of the defendant and each of them, and to the rejection of the prayers of the plaintiff, and each of them, and prayed the court to sign and seal this its bill of exceptions; which is accordingly done, this ninth day of December, 1870.

GEORGE W. DOBBIN. [SEAL,]

Appeal by plaintiff, 16 January, 1871.

Plaintiff's costs.....	$37 80
Defendants ".....	9 2[illegible]

STATE OF MARYLAND, *City of Baltimore, sct:*

I, George Robinson, clerk of the superior court of Baltimo[illegible]he act
do hereby certify that the aforegoing is a true t[illegible]p. 370,
22 taken from the record and proceedings of the said co[illegible]e, so far
therein entitled cause, and made according to the rul[illegible]er of the
by the court of appeals. and July in

In testimony whereof I hereto set my hand and affix [illegible] of the whole
superior court of Baltimore City aforesaid, on this [illegible]ssengers on the
eighteen hundred and seventy-one. [illegible]nths last preced-

[SEAL'S PLACE.] GEO. [illegible]he Constitution of

[Stamp 5-c'ts.] [illegible]s have charged and
[illegible]rtation of passengers

23 And now comes into the court of app[illegible]resaid, and the fact that
The State of Maryland, by Attorney-Ge[illegible]s, have accounted with
Steele, P. F. Thomas, and S. Teackle Wal[illegible] receipts from passengers
the said The Baltimore and Ohio Railroad C[illegible] from denying the consti-
son, J. H. B. Latrobe, J. Randolph Tuc[illegible]is not entitled to recover.
esquires, its attorneys, and thereupon, on [illegible]
more and Ohio Railroad Company, by its [illegible]ollowing, viz:
by the court here, that the said The S[illegible]
errors in the record of proceedin[illegible]
24 the judgment aforesaid, so as afore[illegible]
of appeals here, for correcting the t[illegible] the jury, that even if the
or judgment by the court of appeals herein[illegible] by the subsequent acts
default thereof; and the said The State [illegible]mpose a tax on passengers

aforesaid, says that, in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit: That, by the record aforesaid, it appears that the judgment aforesaid, in the plea aforesaid given, was given for the said The Baltimore and Ohio Railroad Company against the said The State of Mary-
25 land, when, by the law of the land, that judgment ought to have been given for the said The State of Maryland against the said The Baltimore and Ohio Railroad Company; therefore, in that there is manifest error, and it prays that the judgment aforesaid, for that error and others, being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void; and that it, the said The State of Maryland, may be restored to all things which it hath lost by occasion of the said judgment; and that the said The Baltimore and Ohio Railroad Company may rejoin in the errors aforesaid, and
26 so forth: And, thereupon, it is ruled by the court of appeals here that the said The Baltimore and Ohio Railroad Company join in the errors by the said The State of Maryland above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against it in default; and the said The Baltimore and Ohio Railroad Company, by its attorneys aforesaid, says there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid; and it prays that the court of appeals here will proceed to the examination as well of the record of proceedings
27 aforesaid, as of the matters aforesaid, by the said The State of Maryland above for error assigned, and that the said judgment may be in all things affirmed, and so forth: Thereupon, further process of and upon the premises between the parties aforesaid is, by virtue of an act of assembly in such cases made and provided, continued before the court of appeals here until the first Monday in April next; the same day is given to the said parties there then to hear the judgment of the court of appeals hereof and upon the said premises and so forth.

es And now, at this day, to wit, the said first Monday in April, being the third day of the said month, in the year of our Lord
21 1871, come again into the court of appeals here, the parties aforesaid, by their attorneys aforesaid, whereupon as well the record of proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said The State of Maryland above for error assigned, being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that, it appears to the court of appeals here that there is error in the record of proceedings aforesaid, and also in the giving of the judgment afore-
28½ said; therefore, it is ordered by the court of appeals here that the judgment aforesaid, given in form aforesaid, be, and the same are hereby, reversed, and a new trial ordered.

It is also considered by the court here that the said The State of Maryland recover against the said The Baltimore and Ohio Railroad Company the sum of thirty-seven dollars and eighty cents, costs in the superior court of Baltimore City, also the sum of one hundred and thirty-nine dollars and eighty-five cents, costs in the court of appeals, by the court here adjudged unto the said The State of Maryland, on its assent, for its cost and charges by it laid out and expended
29 about the prosecution of the appeal aforesaid, and that the said The State of Maryland have thereof execution, &c. The court of appeals filed the following opinion, to wit:

30 In the court of appeals of Maryland. April term, 1871.

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 12. Special docket.

Appeal from the superior court of Baltimore City.

BARTOL, *Chief Judge:*

The questions presented by this appeal are of very great interest and importance; more on account of the character of the parties, and the large amount of money involved, than by reason of any intrinsic difficulty in the questions themselves. These depend for their solution upon plain and familiar principles of law, which are not affected in their application either by the amount in controversy or the dignity and power of the parties litigant.

The action is indebitatus assumpsit instituted by the appellant against the appellee, on the 6th day of May, 1870.

The declaration contains a count "for money had and received by the defendant for the use of the plaintiff."

In answer to the defendant's demand for a bill of particulars, the plaintiff's claim was stated to be "for five hundred thousand dollars, ($500,000,) being the one-fifth part of the whole amount of moneys received by the defendant for the transportation of passengers upon the Washington Branch of the Baltimore and Ohio Railroad, from the first day of January, 1860, to the first day of January, 1870; which said
31 sum of five hundred thousand dollars was received by the defendant for the use of the plaintiff, and was due and in arrears to the plaintiff at the time of the institution of this action."

The defendants plead "that they never were indebted as alleged by the plaintiff," and also filed a plea of set-off.

To this second plea there was a demurrer, which, was sustained by the court below. Issue being joined on the first plea, a verdict was rendered in favor of the defendant under the instructions of the superior court, and from the judgment thereon this appeal has been taken.

It appears from the bill of exceptions that the plaintiff offered in evidence the acts of the general assembly of Maryland, containing the charter of the defendant, all the acts of assembly relating to the construction of a railroad between the cities of Washington and Baltimore, and to the payment to the plaintiff by the defendant of one-fifth part of the whole amount which may be received by it from the transportation of passengers on the said branch road, and all other acts applicable in the premises; that these acts were accepted by the defendant, and the branch road completed and put in operation under them in the year 1835. Also offered in evidence statements made from the books of the defendant, showing the whole amount of money so received by the defendant for the transportation of passengers, and the portion thereof paid to the State on account of said one-fifth, during the period covered by the bill of particulars, showing an apparent balance unpaid on the 1st day of January, 1870, of $316,871.43. Evidence was then offered showing that the fare charged and received from passengers on the branch road, during the whole period of time covered by the bill of particulars, was one dollar and fifty cents for each passenger between Wash-

ington and Baltimore, and at the same rate for shorter distances; and that, from the time of the completion of the branch road down to the first day of January, 1868, the defendant had annually rendered account purporting to show the gross amount received for the transportation of passengers, and the State's proportion thereof; and had made semi-annual payments in January and July in each year on account of the same, to the treasurer of Maryland, down to the first day of July, 1868.

After the testimony on the part of the plaintiff had been closed, two prayers were offered on the part of the defendant, stating substantially:

32 1st. That the several acts of assembly, so far as they provide for the payment by the defendant to the treasurer for the use of the State of one-fifth of the money received for the transportation of passengers on the branch road, are unconstitutional, because in conflict with the Constitution of the United States.

2nd. That the defendants are not estopped from denying the constitionality of said acts, by reason of their having charged and received one dollar and fifty cents for the transportation of each passenger for the whole distance over the branch road, and accounted with and paid to the treasurer one-fifth of the gross receipts from passengers on said road up to the 30th day of June, 1868, and that the plaintiff was not entitled to recover.

These prayers were granted by the superior court. It thus appears that the defence to the action rests entirely upon the alleged ground that the several acts of assembly, whereby the obligation was assumed by the company to pay to the State treasurer, the one-fifth of the gross amount received from the passenger fare on the railroad, are inoperative, because in conflict with the Con'titution of the United States.

The argument urged in support of this position is that the operation and effect of such a contract between the company and the State is to impose a capitation-tax upon the passengers, to the amount of one-fifth of the railroad fare charged by the company; which to that extent, is a tax upon the right of citizens to travel through the State, and is a violation of the constitutional rights of the citizen under the decision of the Supreme Court, in Crandall vs. Nevada, (6 Wallace, 35.)

This constitutional question has been fully argued, and has received the consideration by this court which its importance demands; and before concluding this opinion we propose to explain the grounds upon which we think the contract between the State and the railroad company is free from all constitutional objection.

But before taking up that question it is proper to say that, in our judgment, the rights of the parties in the present suit do not, by any means, necessarily depend on its solution,

If, as we think, the legislation of the State in question is constitutional and valid, the defence relied on by the appellee fails, and the judgment must of course be reversed. But if for the purposes of the present case, it be conceded that the defendant's position upon the constitutional question is correct, that the effect of the act of 1832,

33 and its supplements, is to impose upon passengers a capitation-tax, collected from them by the railroad company, for the use of the State, above and beyond the mere charge for transportation, (and upon that ground alone is it contended that the one-fifth of the money paid by the passengers is an unconstitutional tax;) and if in point of fact a sum of money so collected has actually been received by the company, then it is money collected not for itself, but for the use of the State,

and the question arises whether it is competent for the company to set up as a defence to the action brought by the State for the recovery of the money so received, that the acts of assembly under which it was collected were unconstitutional. That is the question raised by the prayers offered by the plaintiff, which were refused by the superior court.

They assume for the purposes of the present case that the money collected from passengers for the use of the State was an unconstitutional exaction from them, as alleged by the defendant, and yet assert the proposition that this furnishes no defence in the present suit; and that the plaintiff is entitled to recover one-fifth of the gross sum actually received for the transportation of passengers, and not already paid to the plaintiff "without regard to any question of conflict between the acts of assembly and the Constitution of the United States." Or to state the proposition more plainly, that the railroad company, having collected certain moneys from passengers for the use of the State, cannot be allowed to retain the money, and refuse to pay it to the party to whom it belongs, on the plea that the persons from whom it was collected were not legally bound to pay it. In our opinion this proposition is a sound one consonant with the plainest principles of reason and justice, and supported by an unbroken current of decisions.

This action is indebitatus assumpsit, upon the implied promise of the defendant to pay to the State the money collected for its use; the receipt of the money for the plaintiff's use being the ground of the action from which the implied promise springs.

In such case the question of the validity of the law under which the money was collected cannot properly arise. That is a distinct and collateral question which might have been raised by the persons from whom the money was collected, but cannot be successfully urged by the railroad company in answer to the suit of the State. Of course we are not to be understood as maintaining the proposition, that the legal rights of parties are dependent upon the mere form of action adopted, or that it is competent by resorting to an action upon an implied assumpsit, to enforce a contract, which could not be enforced by an action brought
34 on the express contract. Such an evasion is not tolerated by the law, which does not allow that to be done indirectly which cannot be done directly. But if the foundation of the suit be something collateral to the illegal contract or transaction, and the plaintiff is not obliged to resort to this in order to maintain the suit, or to derive any aid from it, then the illegality of the original transaction is not a defence to the suit.

There is a broad and well recognized distinction between suits to enforce illegal contracts, and those asserting title to money arising from them. We shall presently cite some authorities in support of this general proposition. But first let us examine more particularly the nature of the arrangement between the State and the railroad company, and see in what its supposed unconstitutionality is alleged to consist. There is no pretence of any intentional violation of the Constitution, nor is there any express provision of that instrument to which the State laws are repugnant; it is said they are in conflict with the [its] general scope and spirit. This is then not a case of turpis contractus.

The defence here urged is that, under its contract with the State, the company has added the moneys for the State's account, to the fares it collected for itself, and thus collected from passengers a capitation-tax for the use of the State, which could not be constitutionally imposed. Now if this be so, the illegality of the transaction consisted entirely in

the supposed unconstitutional exaction from the passengers. They were the only parties whose constitutional rights were invaded. They having waived the question of legality and paid the money voluntarily to the railroad company, cannot recover it back. This position is settled by numerous authorities; among them we cite Lefferman vs. Mayor, &c., 4 Gill, 425; Morris vs. Mayor, &c., 5 Gill, 248; Balt. & Sus. R. R. Co. vs. Faunce, 6 Gill, 76; and Lester vs. Mayor, 29 Md., 415.

That a party may waive a constitutional provision which applies in his favor, was decided in Baker vs. Braman, 6 Hill, 48, cited and approved by the Supreme Court in the recent case of the P. W. & B. R. R. Co. vs. Trimble, 10 Wallace, 382.

The question then is, shall the defendant be allowed to retain the money as against the claim of the State?

It is certainly true that the courts of justice do not lend their aid in the enforcement of illegal or unconstitutional contracts. But in the aspect in which the defence in this case is presented, the contract between the State and the Company, if obnoxious at all to objection on constitutional ground, can only be so in respect to the collection from pas-
35 sengers of the one-fifth of the fare for the use of the State. It is perfectly clear that when the money has actually been collected by the company, that part of the transaction which is supposed to be unconstitutional has been completed; the illegal contract has been performed and is at an end, and in no manner enters into the question which subsequently arises between the railroad company and the State as to the duty and obligation of the company to pay over the money to the State, for whose use it was collected and to which it belongs. To that part of the Company's contract there remains no constitutional objection, and it is no answer to the suit of the State, instituted to enforce its payment by the company, that it was an unconstitutional tax upon the passengers.

A point very analogous to this was expressly decided in Waters vs. The State, (1 Gill, 302.) It was there held, that a collector who has received State taxes cannot set up the unconstitutionality of the tax as a defence to the State's recovery. "Having admitted," says Judge Archer, p. 308, "the receipt of the money, the collector, who is in the light of an agent of the State, could not be heard to urge, in his defence to a suit, that the money he had received was on account of taxes which the legislature had no constitutional power to impose."

In Paley on Agency, 28 L. Lib., 62, the general principle is thus clearly and correctly stated:

"If money has been actually paid to an agent for the use of his principal, the legality of the transaction of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands; for though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet when that contract is at an end, the agent, whose liability arises solely from having received the money for another's use, can have no pretence to retain it."

This doctrine is fully sustained by a number of adjudged cases, some of which are cited by the author.

In Tenant vs. Elliott, (1 B. & P., 3,) the defendant, being a broker, effected an illegal insurance for the plaintiff on his ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff.

In deciding the case, Buller, justice, said: "Is the man who has paid over money to another's use to dispute the legality of the
36 original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose shall he retain it? To whom is he to pay it over but to the plaintiff?"

Chief Justice Eyre said, in the same case: "The defendant is not like a stakeholder. The question is, whether he who has received money to another's use, on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

In Farmer vs. Russell, in the same volume, 295, the same principle was decided, and was recognized by Lord Chancellor Cottenham in Sharp vs. Taylor, (2 Phillips Chancery Rep., 817, 818;) and by Sir W'm Grant, M. R., in Thompson vs. Thompson, (7 Vesey, 473.)

These cases have been cited and approved, and the same principle has been followed by the Supreme Court in McBlair vs. Gibbes, 17 Howard, 236, 237, and in Brooks vs. Martin, 2 Wallace, 70. In the case last cited, the bill was filed by one partner to recover his share of the profits of a partnership entered into for the purpose of buying soldiers' claims in violation of an act of Congress. The court say, (p. 79,) the traffic in which the firm was engaged was illegal; and yet the bill was maintained upon the ground that the illegal contract had been completed and was at an end, and the suit was brought to recover the plaintiff's share of realized profits.

The opinion of Lord Cottenham in Sharp vs. Taylor, 2 Ph. Ch., is quoted at great length, citing the cases of Tenant vs. Elliott, Farmer vs. Russell, and Thompson vs. Thompson, as showing the difference between enforcing illegal contracts and asserting title to money which has arisen from them.

The court then say, (p. 81,) "These cases are all reviewed, in the opinion of this court, in McBlair vs. Gibbes, 17 Howard, 232, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied the doctrine thus announced is sound, and is directly applicable to the case before us."

We need only add, that the principles upon which those cases rest, and which have thus received the unqualified sanction of the Supreme Court, appear to us to be consonant with reason and justice, and fully sustain the position taken by the appellant on the question now under consideration.

37 In respect to the one-fifth of the money actually received from passengers by the defendant, which this suit was instituted to recover, as we have before said, the right of the plaintiff to recover does not depend upon the question of the constitutionality of the acts of assembly; for, assuming the appellee's views upon that question to be correct, this furnishes no defence to the present suit.

For these reasons we are of opinion the prayers of the appellant ought to have been granted.

In the view we have taken of this case, as it is presented by the pleading and upon the prayers of the plaintiff, it may, perhaps, be unnecessary to express any opinion upon the constitutional question; but as that is presented by the defendant's prayers, has been fully argued and has received our careful consideration, and as our silence on a matter of so much interest and importance, might lead to some misapprehension with respect to the opinion entertained by this court, we consider it proper to state some of the reasons which have led us to the conclusion

that the legislation of the State now called in question, is nowise in conflict with the Constitution of the United States.

In the preceding part of this opinion we have treated the case as the plaintiff has chosen to present it, assuming the hypothesis of the defendant's prayers to be correct, and have shown that it does not affect the right of the plaintiff to recover in the present suit. But in our judgment this hypothesis is erroneous, and rests upon a misconstruction of the acts of assembly. It seems to us to be a great error to suppose that the arrangement between the State and the Railroad Company, under which the branch road was constructed and went into operation, and the company has enjoyed its franchise, whereby the company, for valid and sufficient considerations, contracted to pay the State a portion of its gross receipts from the transportation of passengers, can be fairly construed as imposing an unconstitutional tax upon passengers within the decision of the Supreme Court in Crandall vs. State of Nevada, (6 Wallace, 35.)

That case arose in this way: The legislature of Nevada, in 1865, enacted "that there should be levied and collected a capitation-tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire." "The proprietors, owners, and corporators
38 so engaged, were required to pay the tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required, from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported, and the payment of the tax to the sheriff or other proper officer." Crandall, the agent of a stage-company, was indicted for refusal to make the required report and pay the tax.

He plead that the law was unconstitutional and void; his plea being overruled by the State court, the case was carried on writ of error to the Supreme Court, where the judgment below was reversed—all the judges being of opinion that the law of Nevada was unconstitutional; two of them (Ch. J. Chase and Mr. Justice Clifford) considered that the State law interfered with the regulation of commerce between the States. The majority of the court placed its decision upon the ground that the Nevada statute taxed every traveller for the privilege of leaving the State by any of the ordinary modes of transit, and that as the right to tax involved the right practically to prohibit, the law was an obstruction, and might, if such a power could be exercised by the State, be made a prohibition of the right of the citizen to unobstructed access to all parts of our common country, and of the right of the Federal Government to secure the presence of the citizen in any part of the Union to aid in its civil administration, or to support it in war.

Such a power was held to be inconsistent with the implied powers of the Federal Government and the rights of the citizens under the Constitution of the United States, and therefore could not be constitutionally exercised by a State.

The language used by the late Chief Justice Taney in his dissenting opinion in the passenger cases, (7 Howard, 492,) is cited in the opinion of the court as stating the ground upon which the decision in the Nevada case was placed, as follows:

"A tax imposed by a State for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the object which that Union was intended to attain. Such a power in the States could produce nothing

but discord and mutual irritation, and they very clearly do not possess it."

It is very clear that the case of Crandall vs. Nevada, fell directly within this plain and salutary rule. The statute there under consideration imposed in terms a "capitation-tax" upon every individual
39 who left the State by a public conveyance. It was held to be a tax upon the right of the citizen to pass through or leave the State, and involved the power of prohibiting the enjoyment of such right altogether. Such a power, it was decided, could not be constitutionally exercised by a State, no matter what terms the statute might employ. The court say: "We should be very reluctant to admit that any form of words which had the effect to compel every person travelling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised."

Such was the decision of the Supreme Court in Crandall vs. Nevada, which being the decision of the court of last resort, is a binding and conclusive authority upon the question.

But in our judgment there is no analogy between that case and the one before us—not the least similarity between the Nevada statute and the acts of assembly of Maryland which are here assailed. These do not, like the Nevada law, in terms or in fact "impose a tax for the use of the State, upon the right of the citizens to travel, at the usual and agreed rate of fare, over existing and established routes, and in existing and established conveyances." The Maryland laws were passed in order to create new and improved modes of conveyance; to give to the traveller better, cheaper and more rapid means of transportation than before existed. It is a perversion of the intention of the legislature, and contrary to the whole scope and meaning of the laws, to construe them as imposing a tax upon travellers or an obstruction upon the right of locomotion.

The whole argument of the appellee, by which it is sought to bring this case within the principle decided in Crandall vs. Nevada, is that the effect of the State's reservation is to increase the fare of the passenger upon the railroad; and thus it operates indirectly as a tax upon him. If this be so it is no infringement of his constitutional rights.

Such would be the effect of any State law imposing taxes upon the property of the company for the support of government, as thereby the pecuniary burdens and expenses of the company would be augmented, and its rates of charge for transportation consequently increased.

The same may be said of any act of incorporation of a railroad company, whereby a *bonus* is reserved to the State for granting the franchise; such a *bonus* might be a sum of money payable by the com-
40 pany in gross, or in installments, or payable out of the receipts of the company for transportation of passengers or merchandise, (Gordon vs. Appeal Tax Court, 3 Howard, 145,) and yet it cannot be for a moment supposed that the State laws, requiring the payment of such taxes or *bonus* by the corporation would be repugnant to the Constitution of the United States.

In construing legislative contracts the same rule applies as in the construction of other contracts. As was said by the Supreme Court in the case of the Binghampton Bridge, (3 Wallace 74,) "They are to be construed to accomplish the intention of the parties. * * * * * It is not the duty of the court by legal subtlety to overthrow a contract; but rather to uphold it and give it effect, and no strained or artificial rule of construction is to be applied to any part of it."

This rule applies with peculiar force when the contract has assumed the form of a law. In dealing with an act of assembly, which is alleged to be inoperative by reason of want of power in the legislature to pass it, for supposed repugnancy to the Constitution of the State or of the United States, every intendment ought to be made in support of the law, and it is not to be declared invalid except for the plainest and most conclusive reasons.

Applying these rules of construction to these acts of assembly, what is their plain meaning and intent?

They confer upon the defendant the franchise and power to construct the branch railroad and to collect tolls for the transportation of passengers and merchandise; the State, in order to aid in the accomplishment of the work, by the act of 1832, (ch. 175,) relinquished the privilege and option which had been retained under the antecedent acts, and engaged to advance a half million of dollars, one-third of the estimated cost of work, and to become a stockholder to that amount. The company for these considerations stipulated to pay to the State a certain portion (one-fifth) of its gross receipts from passenger transportation; and at the same time the State limited and prescribed the *maximum* rates of toll to be charged by the company. The act of 1832 contained a proviso, that the one-fifth of the passenger fare for the whole distance, should not be less than twenty-five cents; or in other words, that the fare for a single passenger should not be less than $1.25. By subsequent acts this provision was repealed; and by the act of 1852, (ch. 328,) which is still in force, the company is authorized to regulate the tolls to be paid for the transportation of passengers, in their descretion, not exceeding the *maximum* already fixed by law.

41 These acts when accepted by the defendant, became a contract between the company and the State. It was entered into in good faith and for valuable and sufficient consideration. It certainly did not enter into the imagination of the parties that it was in any respect repugnant to the Constitution. It has been acquiesced in, and faithfully observed by the company for more than thirty years. This court is now called on to declare it unconstitutional and void, because it is alleged to be a law imposing a capitation-tax upon passengers. Such was not the purpose of the legislature, nor is such intention to be found in the provisions of the law.

It seems very clear to us that the money reserved by the State is a tax upon the corporation, not upon the passengers; and it is therefore not subject to any constitutional objection.

The power of the State to impose such a tax or burden upon the company, with its consent, is too clear to be questioned. The corporation was created by the laws of the State, and except so far as exempted by its charter, it is subject to the jurisdiction and power of the State.

In the case of McCullough vs. The State, (4 Wheaton, 429,) Chief Justice Marshall, in speaking of the power of taxation by a State, says: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is incident. * * * * "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. * * * *

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission."

This is the distinct and well-defined power to which we are to refer the legislation of the State now in question. Is it a tax upon the corpo-

ration? This question is answered by the terms of the law, and its whole tenor and scope. The money is payable by the company out of its own receipts. The passenger fare received by the company, is simply the toll for transportation collected by virtue of its powers under the charter; these are regulated in its discretion, subject only to the limitation prescribed by the acts of assembly, and which the State had the undoubted power to prescribe. Under the law it is bound to render accounts of its gross revenue from passenger transportation, and to pay to the State a sum equivalent to one-fifth of the whole amount so received.

The sums payable to the State are to be ascertained by reference to the amount of gross receipts or income of the company from pas-
42 senger transportation; this furnishes the standard or basis of the computation.

Such is our construction of the acts of assembly; so construed, they are wholly unlike the statute of Nevada considered in Crandall's case in 6 Wallace.

They may be assimilated to the provisions in the act of Congress approved June 30th, 1864, (ch. 173, section 103,) which impose a tax upon railroad companies and other carriers of a certain per centum upon their gross receipts. By the same process of reasoning adopted by the appellee in construing the Maryland laws, these provisions of the act of Congress would be construed as levying a capitation-tax on passengers, and therefore constitutional, for Congress can no more impose such a tax unconstitutionally than can a State legislature, and it is besides prohibited by the Constitution from imposing direct taxes upon the citizen. But the act of Congress referred to is properly construed as imposing a tax upon the carrier, not upon the passengers; and we think the same construction ought to be placed upon the acts of assembly before us.

In our opinion they are not in conflict with the Constitution of the United States, and therefore the superior court erred in granting the pray's of the appellee.

Upon the question raised by the demurrur to the second plea, we concur in the ruling of the superior court.

In actions instituted by the State, it is well settled that no right of set-off exists, unless in cases where such defence is expressly allowed by statute, for the reason that the State, being sovereign, is not liable to be sued by an individual or corporation.

The right to sue the State was given by the act of 1786, (ch. 53;) but this was afterwards repealed and the right taken away.

This immunity belongs to the State by reason of her prerogative as a sovereign, and on grounds of public policy. Parties having claims or demands against her, must present them through another department of the government—the legislature—and cannot assert them by suit in the courts. For the same reason a right of set-off against the State does not exist. This is in the nature of a cross-suit, the object of which is to prevent circuity of action, and it does not exist where the subject-matter of the set-off could not form the ground of an independent suit.

It is a remedy conferred by statutes which do not apply to the State, as she is not expressly embraced by their provisions.

43 For these positions we refer to 8 Gill, 93, 94, 95; 6 G. & J., 121; ibid., 225, '6, '7; 10 G. & J., 225; 9 Gill, 118; 2 Mason, 312.

It is very clear that the subject-matter of defence alleged in the plea cannot constitute a ground for recoupement, because the alleged

cross-claim does not arise in any manner out of the contract or transaction which constitutes the cause of action, but is an entirely separate and distinct claim, having no connexion therewith. (13 Md., 390.)

It could only be relied on if at all, under a plea of set-off, which, as we have said, is not a good plea in this suit, and the demurrer was properly sustained. Although it does not necessarily arise on this appeal, we have considered it proper to express our opinion upon this question, because it is presented upon the record, and in case of another trial might be again raised.

Judgment reversed and new trial ordered.

Separate concurring opinion of Alvey, J., in the right of the State to recover, but not in the present form of action; Grason, J., concurring in this opinion.

The right of the State to recover of the railroad company the tax sued for in the present action is maintained, according to the opinion of the majority of this court, upon the assumption (which is, for the purposes of this suit, a virtual concession) of the illegality of the tax in question; and as I do not perceive the propriety of such an assumption to maintain the right of the State, I must dissent from this mode of disposing of the case, although I entirely concur with the rest of the court in the conclusion that the State is entitled to recover, and that the judgment appealed from should be reversed.

I shall, therefore, in a very brief way, and without at all going into an extended argument upon the subject, state my views of the two questions presented by the record before us.

And first, as to the validity of the tax sought to be recovered in this action.

This question is directly presented by the appellee's prayers, which were granted; and in the argument of it in this court, the great effort in behalf of the company has been to show that the tax in question is of the character of that declared to be unconstitutional and
44 void, in the case of Crandall vs. the State of Nevada, (6 Wall., 35.)

But, with all proper respect for the ability and apparent sincere conviction of the learned counsel who argued for the company, I have been utterly unable to discover the supposed resemblance of the two cases. That reported in 6th Wallace was the case of a specific tax levied on the traveller for the privilege of leaving the State of Nevada by any of the usual and ordinary modes of travel, the question being, as stated by the Supreme Court, the right of a State to levy a tax upon persons residing in the State who might wish to get out of it, and upon persons not residing in it who might have occasion to pass through it. The State law, determined to be in conflict with the Constitution of the United States in that case, provided that there should be levied and collected a capitation-tax, as such by express denomination, of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire, to be collected and paid over to the State by the carriers. But the case at bar is in all material respects different. The law here involved certainly does not in terms impose any specific tax upon the passenger for the right of transit, as in the Nevada case; nor do I think that any ingenuity is capable of so construing its terms as fairly to put the State in the position of imposing a direct tax upon the right of travel, upon the theory that though it be collected as fare, it becomes a direct tax upon the passengers by

simply making the apportionment as between the State and the railroad company. On the contrary, the obvious reading of the law is that this is a special tax, founded on compact between the State and the railroad company, assessed not on the passenger, but on one portion of the company's income and profit. The company is required to pay into the treasury of the State the "one fifth of the whole amount which may be received" for transporting passengers over its road; or in other words, twenty per cent of the gross receipts from one particular branch of its business; and reference is made to the passenger only, by way of limiting and regulating the amount of fare that the company is authorized to exact, not on account of the State, but on that of the company. It is certainly competent to the State to tax the entire gross profits of the company, and if so, it is equally competent to tax any particular part of them. The tax, then, according to my view, is imposed directly upon the profits of the railroad company, and not upon the passenger, as contended by the counsel of the company; and the passenger is not otherwise affected by such tax than he would
45 be by the same amount imposed as a tax upon the bed of the road or its rolling-stock. It may be true, and no doubt is the case, that the rates of fare fixed by the company are somewhat enhanced by the existence of this continuing demand of the State, but it is only as any other tax or demand upon the company would be calculated to produce such enhancement. The company would naturally so regulate its rates of fare as to enable it to discharge its obligations, and to make profit for its shareholders besides. But as the law now stands, and has stood since the act of 1852, (chap. 328,) the company is only restrained from charging as fare more than the maximum rate prescribed by the act of 1832, (chap. 175.) Under that sum it has full and complete discretion over the rates of fare, and the State is only entitled to the one-fifth, or twenty per cent. of the smallest amount that the company may think proper to exact from the passenger as fare. And if the law imposing the tax now sued for were to be declared void, it by no means follows, as a necessary consequence, that the railroad company would lessen its rate of fare. No one can confidently predict such a result, and it is certainly true, that there is no power to compel it to be done. And this being so, what better test could be furnished of the nature of the tax in question, and as to the party upon whom it is imposed? Indeed, as I understand the counsel for the company, it is not only conceded that the fare heretofore charged was legal, but it is insisted upon as the right of the company, in its discretion, to charge and receive of the passenger any rate of fare not exceeding the maximum rate allowed by the law to be charged; the illegality therefore supposed to exist, consisting simply in the claim of the State to share in the proceeds, thus, in effect, at once conceding that the tax is not levied upon the passenger, but upon the income or gross profits of the company, derived from the transportation of passengers. And this tax, thus levied, the company agreed to pay to the State for most material aids and benefits conferred, and for the surrender, by the act of 1832, (chap. 175,) of important and valuable rights held by the State under the acts of 1830 and 1831, recited in the act of 1832, and without which the road could not have been made; certainly not at the time it was made.

Now, seeing that this tax is not a capitation-tax, or in any proper sense a direct tax upon the passenger for the right of transit, can it be successfully maintained that the law imposing it is in conflict with the Constitution of the United States, simply because the passenger may

be incidentally affected by such tax in the price of the fare he may be required to pay to the railroad company?

46 To maintain the affirmative of this proposition, would require that the courts should, in all cases, inquire as to the elements upon which the rates of fare of the numerous railroad companies of the country are based, and if it be found that such rates have any reference whatever to the State taxes that may be imposed upon the company, and whereby the fare of the passenger is at all enhanced, such taxes would, therefore, have to be declared void. If such were to be the declared law, it would certainly afford an easy device by which all the railroads of the country could obtain exemption from State taxation. We may be assured, however, with reasonable certainty, that the principle of the Nevada case will never be carried to such an extent.

I shall add nothing more upon this question, except to refer to the case of The Commonwealth vs. The Railroads, known as the tonnage tax cases, in 62 Penn. St. rep., 286, in which there is a well reasoned opinion of the supreme court of Pennsyvania, upon a question of a kindred nature to that presented in this case. Much of the reasoning in that case applies here, and the most material parts of the argument advanced for the company in this case will be found to be well answered by that opinion.

With these views, I fully concur in opinion with the other members of the court, that there was error committed by the court below, in granting the prayers offered on the part of the appellee—the railroad company.

The next question is, has the State the right to recover this tax of the railroad company in an action simply for money had and received? and it is in reference to this part of the case that I differ from the rest of the court.

Assuming the tax to be valid, and that it is levied upon the profits and income of the company, I think it clear that the action for money had and received is inapplicable and cannot be maintained. I take it to be free from doubt, that the money recoverable in this form of action should have been originally received by the defendant to the plaintiff's use, or, at the time of the action brought, it should have belonged to the plaintiff, and not to the defendant in his own right. That is not the case here. If I am right in supposing the tax to be levied upon the company, and not upon the passenger, the arrears of taxes become an ordinary debt due from the company to the State, and there can be no pretence that the money sought to be recovered in the present action was ever received to the use of the State, or that the company ever held it as belonging to the State, and as distinguished from

47 money held in its own right. If, on the other hand, it be assumed, as has been done for the purpose of maintaining this form of action, that the levy is directly upon the passenger, and that the railroad company is merely the collector of the taxes for the State, then it may be conceded that the action, for money had and received would lie.

But being of opinion as we all are, that the levy is not upon the passenger but upon the company, I must confess I am at a loss to understand why we should not put the judgment of this court upon the proper ground upon which the State is entitled to recover. To adjudge the right to recover upon the mere assumption that the tax is levied directly upon the passenger, and is therefore illegal, as stated in the plaintiff's first prayer, when we determine that in truth it is not so, would seem to be placing the State in a false position with respect to her rights. The question here is, not what would be the right of the State against

the company in the event of the tax being declared illegal, but what is her right, and upon what ground is she entitled to recover, declaring, as we do, the tax to be constitutional and valid. I think the State ought rather to recover as for a valid tax levied upon the company, than as for an assumed illegal one levied upon the passenger and collected by the company. And with the views entertained by this court in regard to the main question involved, that of the constitutionality of the law imposing the tax, I think we ought not to say of the plaintiff's prayers, that they were erroneously rejected by the court below, as they raised directly the question of the applicability of the form of action to the right asserted by the State under the law imposing the tax.

I am, therefore, of opinion that the judgment appealed from should be reversed for the error committed in granting the prayers on the part of the defendant, and that the cause be remanded in order that the State may obtain leave and amend its declaration, so as to entitle it to recover upon the true ground upon which the tax is due, that is, as a tax levied upon and due from the company.

The law having created the claim in favor of the State against the company, and given no specific remedy for its collection, an assumpsit exists upon which the State is entitled to recover in an action of assumpsit, but it must be upon a declaration properly framed, and not as for money had and received. (See the case of the Mayor and City Council of Balto. vs. Howard, 6 Har. & John., 383.)

I am authorized by Judge Grason to say, that he concurs with me in this opinion.

48 The opinion and judgment of the said court of appeals duly certified, are therefore remitted to the clerk of superior court of Baltimore City accordingly, &c.

MEMORANDUM.—Judgment reversed and new trial ordered by the court on the 30th day of May, 1871, and execution awarded for the sum of $37.80 costs in the superior court, and $139.85 costs in court of appeals of Maryland.

Test: JAMES S. FRANKLIN, *Clk.*

MARYLAND, *sct:*

49 I, James S. Franklin, clerk of the court of appeals of Maryland do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court of appeals.

In testimony whereof I hereto set my hand as clerk, and affix the seal of the said court of appeals this 3d day of July, A. D. 1872.

[SEAL.] JAMES S. FRANKLIN,
Clk Court of Appeals of Md.

[5 cts. U. S. int.-rev. stamp, cancelled.]

50 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland begun and held for the said State at the city of Annapolis, on the first Monday in April, being the first day of the said month in the year of our Lord, 1872, and of the Independence of the United States of America the ninety-fifth—

Present, the Hon, James L. Bartol, chief judge; James A. Steuart, John M. Robinson, Richard H. Alvey, Oliver Miller, Richard T. Bowie, George Brent, Richard Grason; James S. Franklin, clerk—

Among others were the following proceedings, to wit:

51 THE BALTIMORE AND OHIO RAILROAD Company
vs.
THE STATE OF MARYLAND.

Be it remembered that, now here, on the first Monday in October, being the second day of the said month in the year of our Lord, 1872, the judge of the superior court of Baltimore City, being in the eighth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmit to the court of appeals here, the record of proceedings of a plea which was lately
52 depending before him in the superior court of Baltimore City, between The State of Maryland, plaintiff, and The Baltimore and Ohio Railroad Company, defendant, and wherein the said superior court gave judgment for the said The State of Maryland against the said The Baltimore and Ohio Railroad Company, and from which said judgment the said The Baltimore and Ohio Railroad Company appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

53 In the superior court of Baltimore City.

(For previous proceedings, see record filed in court of appeals 11th March, 1871. New trial granted by court of appeals on the 30th day of May, 1871.)

THE STATE OF MARYLAND
vs.
THE BALTIMORE AND OHIO RAILROAD Company.

1st December, 1871. Jury sworn.
Same day. Verdict for the plaintiff.
Damages, $351,291.18.
Judgment inde.
24th February, 1872. Appeal by defendant.

Bill of exceptions.—Filed 24th February, 1872.

At the trial of this cause the plaintiff, to sustain the issue on its part, offered in evidence the acts of the general assembly of Maryland, containing the charter of the defendant, all the acts of assembly relating to the construction of a railroad between the cities of Washington and Baltimore, and to the payment to the plaintiff by the defendant of one-fifth part of the whole amount which may be received by it from the transportation of passengers on the said branch road, together with all other the acts of assembly of Maryland applicable in the premises; which said acts of assembly it was agreed should be read from the statute-book, on appeal, as if inserted herein. The plaintiff also offered evidence tending to show the acceptance by the defendant of all said acts proper or necessary to be by it accepted; and further proved the construction and completion of said branch road, and its having been put into full operation, under said acts of assembly, in the year 1835; and also offered in evidence statements made from the books of the defendant, showing the said whole amount of money so received by the defendant for the transportation of passengers, and the portion thereof paid by

the defendant to the State, on account of the said one-fifth, during the period covered by the bill of particulars in this cause, which statements show the following result, which, by agreement of counsel, is admitted to be correct, viz: Due by the defendant to the plaintiff, assuming the claim of the plaintiff to be well founded in law, $351,291.18, principal and interest, down to the first of January, 1870, inclusive.

And the plaintiff then further offered evidence showing that the fare charged and received by the defendant for said transportation of passengers on said branch road, during the period of time covered by the bill of particulars in this cause, was one dollar and fifty cents for each passenger between the cities of Washington and Baltimore, and at the same rate for shorter distances.

And the plaintiff further proved that the president of the defendant, from the time of the completion of the said branch road, had annually rendered an account, purporting to show the gross amount received by defendant for the transportation of passengers on said road, and the State's proportion thereof, down to the first of January, 1868, and
54 that the defendant had made semi-annual payments in January and July of each year, on account of the same, to the treasurer of Maryland, down to the first of July, 1868.

And thereupon the case of the State having been closed, the defendant, by leave of the court, and under the thirty-third rule thereof, offered the two prayers following, viz:

The defendants, by their counsel, pray the court to instruct the jury as follows:

First. That the act of assembly of 1832, (chap. 175,) and the acts of assembly, of 1836, (chap 261, 1844, chap. 103, 1845, chap. 370, and 1852, chap. 328, which have been offered in evidence, so far as they provide that the defendant shall pay to the treasurer of the western shore of Maryland, on the first Monday of January and July, in each and every year, for the use of the State, one-fifth of the whole amount that may be received for the transportation of passengers on the branch road mentioned in said acts, during the six months last preceding, are unconstitutional, because in conflict with the Constitution of the United States.

Second. That the fact that the said defendant has charged and received one dollar and fifty cents for the transportation of passengers for the whole distance over the branch road aforesaid, and the fact that the defendant, up to the 30th day of June, 1868, has accounted with and paid to the treasurer one-fifth of the gross receipts from passengers on said road, do not estop the said defendant from denying the constitutionality of said acts, and that the plaintiff is not entitled to recover.

And the plaintiff offered the two prayers following, viz:

1. The plaintiff prays the court to instruct the jury that, even if the act of assembly of 1832, ch. 175, as modified by the subsequent acts of assembly offered in evidence, is held to impose a tax on passengers traveling on the Washington Branch Road, and to be therefore unconstitional under the Constitution of the United States, still the plaintiff is entitled to recover under its count for money had and received, as explained by the bill of particulars, one-fifth of the gross amount which the jury shall find to have been received by the defendant for the transportation of passengers upon the Washington Branch Road, and not already paid over by the defendant to the plaintiff.

2d. The plaintiff prays the court further to instruct the jury, that if they shall find from the evidence that the defendant accepted the terms of the several acts of assembly read in evidence, relating to the rate of fare for the transportation of passengers on its road between the cities of Baltimore and Washington, and relating to the payment to the State of one-fifth of the said fare, and that the defendant, between the 31st day of December, 1859, and the 31st day of December, 1869, received, for the said transportation, any sum of money, then the plaintiff is entitled to recover in this action one-fifth of the sum which the jury may so find to have been received, and which has not already been paid to the plaintiff, without regard to any question of conflict between the said acts, or any of them, and the Constitution of the United States.

Whereupon the court refused the two prayers of the defendant, and granted the two prayers of the plaintiff; to the granting of which prayers of the plaintiff, and each thereof, and to the refusal of which prayers of the defendant, and each thereof, the defendant prayed leave to except, and that the court would sign and seal this its bill of exceptions; which is accordingly done this first day of December, 1871.

GEORGE W. DOBBIN. [SEAL.]

55 STATE OF MARYLAND,
City of Baltimore, set:

I, George Robinson, clerk of the superior court of Baltimore City, do hereby certify that the aforegoing is a true transcript, taken from the record and proceedings of the said court in the therein entitled cause, and made according to the rules prescribed by the court of appeals.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore City aforesaid, on this sixth day of March, eighteen hundred and seventy-two.

[SEAL'S PLACE.] GEO. ROBINSON, *Clerk.*

[U. S. int. rev. stamp—5 cts.]

Costs on 2nd trial.

Plaintiff's costs	$4 70
Defendant's	11 45

56 And now come into the court of appeals here, as well the Baltimore and Ohio Railroad Company, by J. H. B. Latrobe and O. J. M. Gwynn, esq., its attorneys, as the said The State of Maryland, by I. N. Steele, P. F. Thomas, and S. Teackle Wallis, esquires, its attorneys; and thereupon, on motion of the said The State of Maryland, by its attorneys aforesaid, it is ruled by the court here that the said The Baltimore and Ohio Railroad Company assign the errors in the record and proceedings aforesaid, or in the giving the judgment aforesaid, so as aforesaid brought before *before* the court of appeals here for
57 correcting the errors supposed to be therein, or judgment by the court of appeals here will be entered against it in default thereof; and the said The Baltimore and Ohio Railroad Company, by its attorneys aforesaid, says that, in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid in the plea aforesaid given was given for the said The State of

Maryland against the said The Baltimore and Ohio Railroad Company, when by the law of the land that judgment ought to have been
58 given for the said The Baltimore and Ohio Railroad Company against the said The State of Maryland, therefore in that there is manifest error; and it prays that the judgment aforesaid, for that error and others, being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that it, the said The Baltimore and Ohio Railroad Company, may be restored to all things which it hath lost by occasion of the said judgment, and that the said the State of Maryland may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here that the said The
59 State of Maryland join in the errors by the said The Baltimore and Ohio Railroad Company above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against it in default thereof. And the said The State of Maryland, by its attorneys aforesaid, says there is no error in the record of proceedings aforesaid, nor in the giving the judgment aforesaid, and it prays that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid, as of the matters aforesaid by the said The Baltimore and Ohio Railroad Company above for
60 error assigned; and that the said judgment may be in all things affirmed, and so forth; thereupon further process of and upon the premises between the parties aforesaid, is, by virtue of an act of assembly in such case made and provided, continued before the court of appeals here until the first Monday in April next. The same day is given to the said parties there then to hear the judgment of the court of appeals hereof and upon the said premises, and so forth.

And now, at this day, to wit, the said first Monday in April, being the first day of the said month, in the year of our Lord 1872,
61 come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid. Whereupon as well the record and proceedings aforesaid and the judgment given in form aforesaid as the matters aforesaid, by the said The Baltimore and Ohio Railroad Company above for error assigned, being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here that there is no error in the record of proceedings aforesaid, nor in the giving of the judgment
62 aforesaid; therefore it is considered by the court of appeals here that the judgment aforesaid, given in form aforesaid, be in all things affirmed, and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding. And it is further considered by the court of appeals here that the said The State of Maryland have execution against the said The Baltimore and Ohio Railroad Company as well for the damages, costs, and charges aforesaid adjudged unto it in the said superior court of Baltimore City as also the sum of $25.85 adjudged unto the said The State of
63 Maryland by the court of appeals here, on its assent, for its costs and charges which it hath sustained by occasion of the delay of the execution of the judgment aforesaid by pretext of the prosecution of the said appeal by the said The Baltimore and Ohio Railroad Company for the correcting of errors of and upon the premises, as aforesaid prosecuted, &c.

And thereupon, on the 21st June, 1872, the court of appeals filed the following opinion, to wit:

THE BALTIMORE AND OHIO RAILROAD COMpany
vs.
THE STATE.

64 By the COURT:

This case was before this court at April term, 1871, on the appeal of the State of Maryland. On that appeal the judgment below was reversed, and the cause was remanded for a new trial. At the second trial the court below, in conformity with the ruling and directions of this court, granted the prayers of the appellee, the plaintiff below, and refused to grant the prayers of the appellant.

The case presenting the same question passed upon on the for-
65 mer appeal, the judgment will be affirmed for the reasons assigned in the opinion of the majority of the court on the former appeal.

By reference to that opinion it will appear the decision of the case is rested upon the ground that the plaintiff is entitled to recover, whether the acts of assembly referred to be constitutional or not.

The plaintiff's first prayer distinctly asserts this proposition; and, having determined that prayer to be correct, the judgment is affirmed on that ground.

66 Judgment affirmed.

MEMORANDUM.—Judgment was affirmed in this case on the 21st day of June, 1872, and execution awarded for the sum of $351,291.18, with interest thereon from the 1st day of December, 1871, until paid; $4.70 costs in superior court, and $25.85, costs in court of appeals.

Test: JAMES S. FRANKLIN, *Cl'k.*

MARYLAND, *sct:*

I, James S. Franklin, clerk of the court of appeals of Maryland, do hereby certify that the aforegoing is truly taken from the record
67 and proceedings of the said court of appeals.

In testimony whereof I hereto set my hand as clerk, and affix the seal of the said court of appeals, this third day of July, A. D. 1872.

[SEAL.] JAMES S. FRANKLIN,
Cl'k of Court of Appeals of M'd.

[5-c't int. rev. stamp, canceled.]

(Indorsement on cover:) No. 398. The Baltimore and Ohio Railroad Company, plaintiff in error, vs. The State of Maryland. Maryland c't of appeals. Filed 17th July, 1872.

April 27. 1875

Friday.

Bradley J.

IN THE

Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE STATE OF MARYLAND,

Defendant in Error.

On a Writ of Error to the Court of Appeals of the State of Maryland.

BRIEF OF PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE STATE OF MARYLAND,

Defendant in Error.

On a Writ of Error to the Court of Appeals of the State of Maryland.

The litigation, as this case now presents itself, grows out of certain Acts of Assembly of the State of Maryland, imposing what the Plaintiff in Error contends is an unconstitutional tax upon passengers transported on the Washington Branch of the Baltimore and Ohio Railroad, between the cities of Washington and Baltimore.

It was commenced by an action for money had and received in the Superior Court of Baltimore city, the bill of particulars in which showed that the State claimed one-fifth of the gross receipts of the Plaintiff in Error for the transportation of passengers between Baltimore and Washington, amounting, as alleged, without interest, from January 1, 1868, to January 1, 1870, to $316,871.43. *Record*, p. 18.

The Defendant below pleaded the general issue, and for a second plea pleaded a set-off of $299,529.65, being, as was alleged, the balance due by the State to the Company on a settlement of accounts during the time that the latter acted as agent for the former in paying the interest on its sterling debt. Joining issue on the first plea, the Plaintiff below demurred to the plea of set-off, and the Court sustaining the demurrer, the one question dis-

cussed when the case was before the jury was the State's right to the one-fifth aforesaid.

To support the issue on its part, the Plaintiff gave in evidence the charter of the Defendant, and all the Acts of the General Assembly relating to the matter in controversy; and there was an agreement, such as exists in the present case, that all these should be in evidence, and read from the volumes printed by authority, as though they were inserted at length in the record.

It was further proven that all the legislation in the premises requiring acceptance was duly accepted by the defendants; that the branch road had been completed and put into full operation in the year 1835; that the Defendant had rendered annually, thereafter, an account of the gross revenue from the transportation of passengers on the branch road, and had made semi-annual payments to the treasurer of Maryland of one-fifth of the gross amount thereof down to July 1, 1868, as required by law; and that, during the time covered by the bill of particulars, the fare charged by the Defendant below was $1.50 for each passenger for the whole distance between Baltimore and Washington, and at the same rate for shorter distances.

The first of the Acts of Assembly of Maryland above referred to, which was regarded as important in this connection, was the Act of 1830, ch. 158, which authorized the construction of the branch road. The 3d section is as follows:

And be it enacted, That the Baltimore and Ohio Railroad Company shall be entitled to charge and take as compensation for the use of the railroad which they are authorized to construct by this Act, and for the conveyance of passengers and transportation of property thereon at and not exceeding the following rates and amounts, to wit: for conveying any person or transporting any parcel or property any distance whatever, twelve and a half cents; for conveying any person the whole distance between Baltimore and Washington, not exceeding one dollar and fifty cents; and four cents per mile for any part of the distance more than three miles. 1830, ch. 158, s. 3.

Nothing was done under this Act or under another Act of the following session, 1831, ch. 331, (which it is not necessary here to do more than mention) in the construction of the Branch road.

This was finally completed under the Act of the General Assembly of 1832, ch. 175, and an Act of Congress. Appd Mar. 2, 1831.

The seventh and eighth sections of the Act of 1832, ch. 175, are as follows:

And be it enacted, That the Baltimore and Ohio Railroad Company shall be entitled to charge and take for conveying each person, *the whole distance between the cities of Baltimore and Washington, not exceeding two dollars and fifty cents, and in proportion for every shorter distance.* 1832, ch. 175, s. 7.

And be it enacted, That the Baltimore and Ohio Railroad Company, *shall pay to the Treasurer of the Western Shore of Maryland, on the first Monday in January and July in each and every year, for the use of the State, one-fifth of the whole amount which may be received for the transportation of passengers on said Railroad by said Company during the six months last preceding;* and it shall be the duty of the President or chief officer of the Baltimore and Ohio Railroad Company to exhibit, on oath or affirmation, to the General Assembly, on the first day of January, or as soon thereafter as the said Assembly shall convene, in each and every year, an account, showing the gross amount received by said Company for the transportation of passengers on said road, and the State's proportion thereof; *provided, that the charge for conveying* each person *the whole distance between the cities of Baltimore and Washington shall not be reduced below the maximum of two dollars and a half, hereinbefore established*, unless by the consent of the General Assembly, or in the recess of that body, by the consent of the Governor and Council, which consent shall be effective until the end of the session of the General Assembly next ensuing; *and provided, also, that in no case shall the amount received by the State from the Baltimore and Ohio Railroad Company for the conveyance of* each person *the whole distance between the two cities*, BE LESS THAN TWENTY-FIVE CENTS; and provided, that at any time and at all times whenever an application is made to the Legislature by said Company, to reduce said maximum price, it shall be lawful for the Legislature to make such regulation of charge as it may deem necessary, *not reducing the transportation of passengers to the Company below one dollar and fifty cents for the whole distance, and rateably for any shorter distance.* 1832, ch. 175, sec. 8

Subsequently, the State gave a discretion to the Company in regard to the fare, on the same day, between Baltimore and Washington, by the seventh section of the Act of 1836, ch. 261, which is as follows:

"*And be it enacted*, That the Board of Directors be and they are hereby authorized to reduce the rate of tolls, from time to time, in their discretion, for passengers upon the Washington

Branch of said road, by carrying them to and from the respective cities of Washington and Baltimore, or to and from any point or points on said branch road, *on the same day*, for a less sum than is now authorized; *provided, always, that one-fifth part of all such passage money so received, be accounted for and paid into the State Treasury.*" 1836, ch. 261, sec. 7.

The next step was to authorize the Company to regulate the fares, at its discretion, generally; provided, the fare was not reduced below one dollar and fifty cents. This was done by the Act of 1844, ch. 103, as follows:

"*Be it enacted by the General Assembly of Maryland*, That from and after the first day of June next, the Baltimore and Ohio Railroad Company be and they are hereby authorized to reduce the rate of tolls for passengers, from time to time, in their discretion, upon the Washington Branch of the said road, by carrying them to and from the respective cities of Washington and Baltimore, for a less sum than is now authorized; provided, that the charge for a passenger, to and from the said cities, shall not be less than one dollar and fifty cents: *and provided always, that one-fifth of all such passage money so received, be accounted for and paid into the Treasury as now required by law.*" 1844, ch. 103, sec. 1.

"*And be it enacted*, That the said Baltimore and Ohio Railroad Company be and they are hereby authorized to transport passengers on the said Washington road, to and from the respective cities of Washington and Baltimore for a less sum than is now authorized, in cases where such passengers shall perform the trip to and from the two cities within the period of three days; *provided always, that one-fifth part of all such passage money so received, be accounted for and paid into the State Treasury as aforesaid.*" Sec. 2.

"*And be it enacted*, That the said Baltimore and Ohio Railroad Company shall also be authorized and required to transport way passengers upon the Washington Branch, in proportion to the charge from city to city, *with the same proviso, and subject to the same condition as is expressed in the first and second sections of this Act, with regard to passengers from city to city.*" Sec. 3.

To obviate a doubt, whether the existing legislation was applicable to passengers over the branch road to and from places beyond the terminal cities, the Act of 1845, ch. 370, was passed.

"*Be it enacted by the General Assembly of Maryland*, That the power heretofore granted to the President and Directors of the

Baltimore and Ohio Railroad Company to reduce the fare, at their discretion, upon all passengers travelling from a point beyond the city of Baltimore to a point beyond the city of Washington, and *vice versa*, is hereby extended in like manner to all passengers travelling from the city of Baltimore to a point beyond the city of Washington, and from the city of Washington to a point beyond the city of Baltimore." 1845, ch. 370, supplementary to the Act of 1844, ch. 103.

And finally, in 1852, the Company was vested with absolute discretion in the regulation of tolls, with the single proviso *that they should not exceed the two dollars and fifty cents of the Act of* 1832, ch. 175, thus:

"*Be it enacted by the General Assembly of Maryland*, That the Baltimore and Ohio Railroad Company shall be authorized to regulate the tolls to be paid for the transportation of passengers on the Washington Branch of the said road, in their discretion, not exceeding the maximum heretofore fixed by law; *provided that one-fifth of the* passage money *received from the said Branch Road be accounted for and paid into the State Treasury, as now required by law.*" 1852, ch. 328.

While citing the Acts of Assembly of Maryland, it is proper to refer here to the Act of 1842, ch. 116, which, though it never was carried into effect by a sale of the works therein mentioned, has a bearing on the present litigation, inasmuch as it shows that the Legislature at its date regarded, and so described, the reserved one-fifth of the gross amount received for the transportation of passengers between Baltimore and Washington, as A TAX. The third section of the Act is as follows:

And be it enacted, That on or after the day designated in the first section of this Act, upon the delivery of State bonds or certificates of debt bearing interest of not less than five per cent. to the Treasurer aforesaid, not less in amount than four millions two hundred thousand dollars, it shall be the duty of the Treasurer, and he is hereby authorized and directed to convey to the purchaser or purchasers in proper form, all the stock which the State holds in the Baltimore and Ohio Railroad Company, and the Washington Branch thereof, and upon the execution and delivery by said Company to the Treasurer of a mortgage in proper form upon the profits of the said Company arising from the Washington Branch of the said Railroad for the payment of a perpetual annuity of thirty thousand dollars, payable quarterly to the State Treasury, the Treasurer is authorized and empowered

to execute to said Company *a release of* THE TAX *of one-fifth of the passage money on said Washington Branch Road secured to the State by existing laws.*

At the trial of the case in the Superior Court, the Defendant below asked the following instructions to the jury:

First. That the Act of Assembly of 1832, ch. 175, and the Acts of Assembly of 1836, ch. 261; 1844, ch. 103; 1845, ch. 370, and 1852, ch. 328, which have been offered in evidence, so far as they provide that the Defendant shall pay to the Treasurer of the Western Shore of Maryland, on the first Monday of January and July, in each and every year, for the use of the State, one-fifth of the whole amount that may be received for the transportation of passengers on the branch road mentioned in said Acts, during the six months last preceding, are unconstitutional, because in conflict with the Constitution of the United States.

Second. That the fact that the said Defendant has charged and received one dollar and fifty cents for the transportation of passengers for the whole distance over the branch road aforesaid, and the fact that the Defendant, up to the 30th day of June, 1868, has accounted with and paid to the Treasurer one-fifth of the gross receipts from passengers on said road, do not estop the said Defendants from denying the constitutionality of said Acts, and that the Plaintiff is not entitled to recover.

And the Plaintiff below offered the following prayers:

First. The Plaintiff prays the Court to instruct the jury that even if the Act of Assembly of 1832, chap. 175, as modified by the subsequent Acts of Assembly, offered in evidence, is held to impose a tax on passengers travelling on the Washington Branch Road, and to be, therefore, unconstitutional under the Constitution of the United States, still the Plaintiff is entitled to recover under its count for money had and received, *as explained by the bill of particulars*, one-fifth of the gross amount which the jury shall find to have been received by the Defendant for the transportation of passengers upon the Washington Branch Road, and not already paid over by the Defendant to the Plaintiff.

Second. The Plaintiff prays the Court further to instruct the jury that if they shall find from the evidence that the Defendant accepted the terms of the several Acts of Assembly read in evidence, relating to the rate of fare for the transportation of passengers on its road between the cities of Baltimore and Washington, and relating to the payment to the State of one-fifth of

the said fare, and that the Defendant, between the 31st day of December, 1859, and the 31st day of December, 1869, received for the said transportation any sum of money, then the Plaintiff is entitled to recover in this action, one-fifth of the sum which the jury may so find to have been received, and which has not already been paid to the Plaintiff, without regard to any question of conflict between the said Acts, or any of them, and the Constitution of the United States.

The Superior Court granted the two prayers of the Defendant, and rejected the two prayers offered by the State of Maryland; and the verdict, under the instructions, being for the Defendant below, the Plaintiff below appealed to the Court of Appeals, which reversed the rulings of the Superior Court, and the case came back, and was re-tried.

At the second trial, the same instructions that were asked for at the first, were again asked for by the respective parties. This time, however, the instructions given being in accordance with the decision of the Court of Appeals, a verdict was rendered for the Plaintiff for $351,291.18.

Exceptions were now taken by the Defendant, and the case was carried once more to the Court of Appeals, with a view to bring the case before the Supreme Court, by writ of error.

The Court of Appeals, in their opinion on the first appeal, discussed two questions at length.

First. The right of the State to recover in an action for money had and received, whether the Acts under which the money came into the hands of the State were constitutional, or not.

Second. The constitutionality of the Acts in question.

The majority of the Court held that in either case—whether the Acts were constitutional or not—the action would lie.

The minority of the Court held that the action should have been by assumpsit, "upon a declaration properly framed, and not in an action for money had and received." *Record* p. 30.

The Court, however, was unanimous in determining the law referred to, to be constitutional.

When the case came before the Court of Appeals on the second occasion, they said:

"The case presenting the same question passed upon in the former appeal, the judgment will be affirmed for the reasons

assigned in the opinion of the majority of the Court on the former appeal.

"By reference to that opinion it will appear that the decision of the Court of Appeals is rested upon the ground that the Plaintiff (the State) is entitled to recover, *whether the Acts of Assembly referred to be unconstitutional or not.*" See *Record*, page 35.

Believing that the constitutional or "federal question" arising in the case upon the pleadings, and decided by the State tribunals, authorized the Defendants in Error to bring the case before the Supreme Court of the United States for review, the present writ was applied for, and was granted by Mr. Justice Bradley. As soon as the return was made and the case docketed, the Defendants in Error moved to dismiss the writ for want of jurisdiction. Very full briefs were filed on both sides; and in the end the motion was overruled. The brief filed on the part of the Plaintiffs in Error discussed the merits as well as the motion, and might be relied on now, did not recent decisions of the Supreme Court, since its preparation, call for a somewhat extended notice. With this addition, and omitting what was then said in connection with the motion to dismiss, the present brief is substantially the same as that heretofore filed.

The opinion of the Court of Appeals, resting, as we have here seen, upon the ground that the State of Maryland is entitled to recover whether the Acts of Assembly referred to are unconstitutional or not—and the judgment in favor of the State being on the ground that in an action for money had and received, the Railroad Company could not plead the unconstitutionality of the law under which, as the State's agents, they had collected it from the passengers—the true question is, whether the Court of Appeals could so separate the collection from the authority to collect, as to make its judgment, whether right or wrong, independent of review by this tribunal. Such, at least, we understand to be the question suggested by the ruling of the Supreme Court on the motion to dismiss, when it says:

"The counsel of both parties are entitled to be heard when the Record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, or its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided."

And the scope of the present argument will be to show that the act of collection is so inseparably blended with the authority to collect, that should this Court hold the legislation of Maryland, in this connection, to be unconstitutional—upon which point the Plaintiffs in Error, according to the above ruling, have a right to be heard, and, as is respectfully insisted, the right to a decision—the decision of the Court of Appeals must necessarily be reversed. *See Murdoch vs. Memphis*, Supreme Court.

We propose, therefore, to maintain the following propositions:

First.—That the legislation of Maryland in regard to the passenger travel between Baltimore and Washington is repugnant to the provisions of the Constitution of the United States.

Second.—That there is no sufficient ground, presented by the record, upon which to affirm the judgment of the Court of Appeals, apart from the decision of the federal question.

FIRST POINT.

The unconstitutionality of the Maryland law.

Up to June 31, 1868, inclusive, the Defendants below had paid to the State the one-fifth of its gross receipts from the transportation of passengers between the cities of Baltimore and Washington; and whatever question in regard to the constitutionality of the tax may have been entertained, it is very probable that the Plaintiff in Error might have continued to pay it, but for the decision in the case of Crandall *vs.* the State of Nevada, reported in 6 Wallace, 35.

This decision was rendered at December term, 1867, and decided that a special tax on railroad and stage companies for every passenger carried out of the State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel; and is not a simple tax on the business of the companies; and that the exercise of the power of a State to levy such a tax is void. It removed any doubts that may have existed previously, and led to the refusal which has resulted in the present litigation. The cases were believed to be parallel. The principle involved in each was the same. The illustrations referred to in the opinion in the Nevada case, were applicable in every respect to the case of the Branch road to Washington. The Act of Nevada differed in nowise, in its effect, from the Act

of Maryland. It made no difference, whether, as in the Western case, the tax was one dollar, and in the Eastern one, twenty-five cents per passenger, so far as the question of the constitutionality of *any* tax was concerned; and with the advice of counsel, the Plaintiff in Error, taking the only practicable means within its reach to bring the question involved before the Supreme Court, refused to pay the tax.

That the Plaintiff in Error's long submission, in ignorance, or doubt, to an unjust exaction, did not impose upon it the obligation of perpetual endurance will not be denied. *Dandridge* vs. *Steam Navigation Company*, 8 *Gill & Johnson*, 248.

In the Plaintiff in Error's conformity to the law in the Nevada case, as it was advised it should do, there was no benefit accruing to itself. Those who used the branch road were the parties to be actually benefited. Regulating the fare by the cost of earning it and a reasonable return to the stockholders, the tax to the State was a charge upon the passenger in addition, and in this way he, and he alone, was the party whose rights were to be affected by the decision.

The Act of Assembly of Nevada, which is now to be compared in its effect with the Act of Maryland, 1832, chapter 175, is as follows:

"There shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle, engaged or employed in the business of transporting passengers for hire."

This tax, the proprietors, individual owners, or corporations, were required to pay, and they or their agents were required to report monthly, under oath, the number of passengers so transported; just as in the case at bar, the President, or chief officer of the Defendants below, was required to exhibit, on oath or affirmation, to the General Assembly, annually, an account showing the gross amount received for the transportation of passengers on the Branch road and *the State's proportion thereof*, the one-fifth, or thirty cents of the whole fare of one dollar and fifty cents.

The Supreme Court pronounced the Nevada Act unconstitutional. The Plaintiff in Error insists that the Nevada case runs on all fours with the case at bar.

Let us look at the supposed differences between the cases.

It may be argued on the other side that the State of Nevada imposed, *in terms*, "a capitation tax" upon all carriers alike, by a general law; while, in this case, the Company made a *contract* with the State, by which it agreed, in consideration of the grant of certain powers and privileges, to pay to the State a portion of its earnings. In other words, that it was not a *tax* that the State imposed, but a *bonus* that the Company agreed to pay.

Now, in the first place, the Legislature itself has called this one-fifth "of the gross receipts, &c., a tax," as we have shewn by reference to the Act of 1842, ch. 110, (see *ante* p. 5) where, in certain contingencies, the Treasurer is authorized to execute to the Baltimore and Ohio Railroad Company "a release of the *tax* of one fifth of the passage money on said Washington Branch road, secured to the State by existing laws."

And this, although by no means settling the question, may be noticed, inasmuch as it explains why the well-known exaction had impressed itself upon the very learned and able Judge who pronounced the opinion of the minority of the Court of Appeals as a tax; for he too treats it as such.

In the first line of his opinion, he speaks of "the tax sued for in the present action," and the first question he proposes to consider is "the validity of the tax sought to be recovered in this action."

But, while the language of Judge Alvey may have been ill-considered, looking to the conclusions he arrived at, the language of the Act of 1842, just quoted, is far from being unimportant. It is a legislative definition of an antecedent legislative Act. It is an explanation by the law-giver of the meaning of phrases previously employed by him; and so far as the terms used control the effect of legislation, those employed in the Act of 1842 are certainly entitled to great weight when the question under consideration is one of legislative intent.

If, however, we are to look at the *effect*, and not at the *language* of this legislation, how do the two cases compare? In the Nevada case, the effect was to make each passenger *leaving* the State pay one dollar to the State. In the case at bar the effect was to make each passenger *entering* or *leaving* the State by the Washington Branch road pay 30 cents, or one-fifth of $1.50, until, after the decision by the Superior Court, the thirty cents was deducted, and the fare reduced to $1.20, which it is to-day.

The payment to the State is irrespective wholly of the earnings of the Company, out of which are defrayed the cost of running the road, &c., and a dividend to the stockholders: these are met by the $1.20, which is the Company's share of the $1.50.

That the phrase "one-fifth of a given sum" is an accurate statement of the quotient resulting from dividing "the given sum" by five cannot, of course, be denied. The tax of one dollar therefore, in Nevada, was not more specific than a tax of one-fifth of the gross receipts, when the fare was $1.50, in Maryland.

In the Nevada case, the carrier was made the collector for the State; in the case at bar, as we have seen, the Company is made the collector, and required by the law to pay the tax to the State out of what it receives from the passenger.

In the Nevada case, the legislation was general in its operation; in the case at bar it is special, being confined to a single company.

But the principle involved is independent of the number of carriers to whom the legislation is applicable. *The wrong done is to each particular passenger;* and the fact that the law is not uniform in its operation—that a portion of the travelling public only, using a particular road, is affected by it—is certainly not an argument in its favor.

If it is unconstitutional to exact payment from a person entering or leaving the State, the unconstitutionality cannot be evaded by the name that is given to the exaction; and the fact, that, in Nevada, the law called the collection to be made from the passengers a capitation tax, and that in Maryland, apart from the Act of 1842, it is described as one-fifth of the gross receipts of the passenger traffic between Baltimore and Washington, can make no difference.

In the Freight tax cases, 15 Wallace, p. 273, Mr. Justice Strong delivering the opinion of the Court, of which more hereafter, says in this connection.

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected, but by the subject on which the burden is laid."

Judge Dobbin, who decided the case in the Superior Court, commented, in his very able opinion, upon this point, and quoted

cases to show in how large a sense this word "tax" was used. In the case of McCullough *vs.* The State, a stamp duty was the form which the tax assumed; in the case of Brown *vs.* The State, a license to trade was the form. Sometimes it was spoken of there as a "duty," as "an impost," as "a custom," as "an exaction;" but whatever the word used, it was regarded as a tax, and, looking to the substance and not to the name, the unconstitutionality was declared.

The Legislature of Maryland, however, in this connection, has obviated, as we have shown, the necessity of philological investigation, by the Act of 1842, ch. 116.

But it may be said that although the word tax is used in the Act of 1842, it is not "*capitation*" tax. But even this distinction is untenable, for the original Act of 1832, ch. 275, makes the tax a "capitation tax," when it declares that in no case shall the State's portion of the fare "*of each person*" "be *less than twenty-five cents*," demonstrating, beyond peradventure, the legislative intent to make the amount to be paid into its treasury depend upon the number of heads carried by the Company, or, in other words, to levy a "*capitation tax.*"

In the brief of the Defendant in Error the accounts of the Plaintiffs in Error are referred to, where the moneys paid to the State are called "undisguisedly" the State's one-fifth, wherever they appear, which is supposed to give weight to the argument that the Railroad Company did not, at their respective dates, take the view of these payments that is now entertained. That the Railroad Company, while it always doubted the constitutionality of the law, would, possibly, not have litigated it, save for the Nevada case, has already been admitted. Still, that does not prevent its now litigating it, under the rulings of the Supreme Court. But even in a philological point of view, when the State made the Company the collector of 30 cents out of a dollar and a half, the 30 cents was properly spoken of as "the State's one-fifth."

This point being disposed of, is there any distinction due to the fact, that in the Nevada case, the law *imposed* a tax, and in the case at bar the Company *contracted* to pay the tax.

If, as we assume, the law is unconstitutional because of its exaction from the passenger, it surely can make no difference

whether the State imposes the tax by a general law, or whether it is the result of a special contract with the party receiving it, in the first instance. If it is wrong, as the Nevada case has decided, for the State to impose such a tax, the wrong cannot be rectified by a contract in which the carrier agrees to pay it out of a gross fund. If the State cannot, of itself, make the traveller pay a portion of his fare into the State Treasury, it cannot delegate to another the power to compel a payment that is, subsequently and circuitously, to find its way into it—unless indeed we are prepared to admit that the law can be simply evaded by the form in which those who collude to evade it may contract for the purpose.

There is one constantly recurring question here which cannot be lost sight of, "Is the charge one that increases the cost of transportation to the passenger for the use of the State, beyond what it would be were the fare regulated by circumstances irrespective of the State?"

The question is answered in the Act of 1832, ch. 175, sec. 8, so often referred to, in the proviso—that in no case shall the *amount* (not the share) "received by the State from the Baltimore and Ohio Railroad Company for the conveyance *of each person* the whole distance between the two cities be less *than twenty-five cents.*"

That the Company, after fixing the fare irrespective of the tax, would pay the thirty cents per passenger out of it, is idle to suppose. Fixing the fare, the amount to be paid to the State out of the gross receipts, as a matter of course became a matter of consideration; and equally as a matter of course a sum was fixed, the deduction of 20 per cent. from which would still leave a remunerative compensation to the Company, which becomes as much the collector for the State of the latter's 20 per cent. as the stage owner in Nevada was made the collector of the one dollar there. Had the stage owner been willing to pay the tax, he would certainly have added the dollar to the fare of the passenger, exactly as the Plaintiff in Error here added thirty cents to the fare of passengers between the two cities of Baltimore and Washington.

In the State Freight tax cases already referred to, 15 Wallace, p. 274, it is said, "In view of these provisions of the statute,

(and the Pennsylvania law corresponds closely enough with the Maryland one to make the analogy perfect,) it is impossible to escape from the conviction that the burden of tax rests on the freight (passengers) transported," "and that the Company authorized to collect the tax and pay it into the State treasury is in effect only a tax-gatherer."

If, as just suggested, the form which the State and its creature, the Railroad corporation, agree that the charter shall assume, is to settle the constitutionality of an exaction that the Constitution prohibits, and thereby preclude all enquiry by the Supreme Court on behalf of the public, then the Act of 1832, ch. 175, s. 8, will have the very doubtful merit of furnishing a form for the safe violation of law—taking the public from under its shield, and placing them at the mercy of the State and its corporations, who may collude to tax them.

But, it was urged in the Court below, and the argument will doubtless be reiterated, that if the Company had not made this particular contract, the right to build the Washington Branch Road would never have been granted by the State; and a good deal may, perhaps, be said here of the greatness of the boon that the State conceded. So it might be considered now: but in 1830 there was not a single railroad in the United States for the transportation of passengers; and so far from the Branch Road charter being seized upon with avidity by the public, three years dragged on before any thing could be done; and at last, as is seen by one of the provisions of the Act of 1832—the Company had to be authorized to subscribe for such part of the capital stock as the public would not take, and was, in fact, obliged to subscribe nine-tenths of it. The advantages to both parties to the charter, were from the stand-point of 1832, equal at all events.

One of the arguments in the State Courts was, that the tax in question was a *bonus* from the Company to the State, such as is frequently paid for the grant of corporate powers: and that, in this respect, the case at bar differs from the Nevada case.

The answer to this is to be found in the scope of what has already been said. But let us look at it a little more closely.

As a *bonus* is ordinarily understood, it is a payment by the stockholders in a corporation for corporate privileges. If paid at once, it affects their capital. If paid annually, it affects their income.

But here, neither the capital nor the income is affected The capital is not affected because the payment is an annual one. The income is not affected because this annual payment does not belong to the Company, but is received by it, accounted for by it, and paid into the State Treasury. Affecting, then, neither the capital nor the income of the stockholders, it comes within no known definition of a *bonus*. It is a tax, and nothing but a tax, a capitation tax, in the recognized meaning of the term.

Since the docketing of this case and the filing of the first Brief of the Plaintiff in Error, the case of the Reading Railroad Company *vs.* Pennsylvania—reported as the case of the State Freight tax, in 15 Wallace, 232—seems to settle conclusively, the constitutional question involved here, fully corroborating the case of Crandall *vs.* Nevada, already referred to.

The State of Pennsylvania had imposed a tax of two cents on every 2000 lbs. of the products of mines, &c. carried over the railroads of the Commonwealth ; and the Reading Railroad Company, keeping an account of all the coal transported from its mines beyond the limits of Pennsylvania, refused to pay the tax on that quantity ; raised the constitutional question ; and the consequent litigation brought the case here, where the defence was sustained, and the tax was declared to be repugnant to the Constitution.

It is true that the tax referred to was upon *coal* carried from the mines beyond the limits of the State, and that here it is upon a *passenger* passing beyond Maryland into the District of Columbia. But this is a distinction without a difference, and so the Supreme Court held it, for the decision of Crandall *vs.* Nevada was reconsidered and adopted as analogous

"In *Crandall vs. the State of Nevada*," says the Court, in 15 Wallace, page 281, "where it appeared that the Legislature of the State had directed that there should be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach or other vehicle engaged or employed in the business of transporting passengers for hire, and required the proprietors, owners and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it

was ruled, that though required to be paid by the carriers, the tax was a tax upon passengers, for the privilege of being carried out of the State, and not on the business of the carriers. For that reason it was held that the law imposing it was invalid as in conflict with the Constitution of the United States." After referring to the views of the Chief Justice and Mr Justice Clifford, in the Nevada case, the opinion continues, "In any view of the case, it decides that a State cannot tax persons for passing through or out of it. Inter-State transportation of passengers is beyond the reach of a State Legislature."

But at the same session of the Supreme Court, in a suit between the same parties, it was held by a majority of the Court that a State tax upon the *gross receipts* of Railroad Companies is not repugnant to the Constitution of the United States, though the gross receipts are in part made up from freights received from the transportation of merchandise from one State to another State, or into the State from another; and the Defendants in Error will, no doubt, rely on this decision as counterbalancing the first, and settling the question now at issue in their favor, or at least making the first nugatory.

It is only necessary, it is thought, to examine the two decisions to see that this view of the operation of the second cannot be sustained.

The distinction is this. In the first case, the tax is levied, not upon the property of the corporation in gross, estimated by its receipts, but is a tax upon a single article transported by it, the imposition of which interferes with the inter-State commerce of the country, with which the several States cannot be permitted to interfere. In the other case, the tax is upon the property of the corporation in the aggregate, the value of which is ascertained by ascertaining the *gross* revenue, which is probably as fair a mode as can be adopted

To the argument that this gross revenue necessarily includes that derived from inter-State transportation; and that in taxing such gross revenue, the transportation, which the preceding case has declared cannot be taxed, is subjected to taxation, the answer is, that it by no means follows, that a burden must, necessarily, be imposed on the inter-State transportation by the tax on the gross revenue.

If, prior to the taxation of the gross revenue, a ton of coal, or a passenger destined for another State had been charged a certain rate, and the State taxation *necessarily* caused that rate to be in-

creased, the argument would, perhaps, have more apparent reason; but if the corporation paid the tax without increasing the charge for the ton or passenger, then the effect of the taxation of the gross revenue would be felt by the stockholder only, and not by the miner or traveller; and inter-State commerce would be wholly unaffected by the State taxation; which is exactly what the Constitution of the United States declares that it shall be. The tax would be on the *property* of the corporation, which the State had a right to tax, and not upon the *miners* sending their coal beyond the State, or the *travellers* passing through it, which the State had no right to tax.

The first of the two cases in 15th Wallace was a specific tax on a given article, just as the tax here is a specific tax on each passenger passing through the State, necessarily imposing a burden upon both—while the second of these cases, dealing neither with the coal nor the traveller necessarily, taxes the stockholder and lessens his dividends, but without interfering, directly or indirectly, with the commerce of the country.

To bring the case at bar within this interpretation of the two decisions above quoted, it is only necessary to bear in mind what has already been said of the language of the legislation under review—the whole of which, looking to the intention of the Legislature, is to be found condensed in the provision of the Act of 1832—"*that in no case shall the amount received by the State from the Baltimore and Ohio Railroad Company for the conveyance of each person the whole distance between the two cities be less than* 25 *cents.*

If the argument is reiterated which was made in the State Courts, that the provision which gives to the State one-fifth of the passenger transportation, places the tax upon a different ground from that in the case of Crandall *vs.* Nevada, the answer has already been given in the argument that the tax upon the passenger is the same, whether he is taken separately or is included with many others—the tax is still one upon inter-State transportation of passengers. Had the road declared that the tax should be one-fifth of the *gross revenue* of the Washington Branch from all sources, while the amount of such a tax would have been monstrous, yet it would not necessarily have fallen upon any one but the stockholders; unless the Company had exacted a part of it from the passengers; not because of any law requiring them to do so, but of their own motion. Such a tax, however, would have been constitutional under the second case in 15th Wallace.

But this is not the case at bar, as we have attempted to demonstrate.

In what we have here said of the two cases, our object in drawing the distinction, which is apparent on their face, has been to show that the second does not affect the argument now made, which places the unconstitutionality of the Maryland legislation upon the cases of Crandall *vs.* Nevada, and the cases in that category, and especially upon the first of the cases in 15th Wallace.

In addition to the foregoing, we cite also the Slaughter-house case in 16th Wallace, 36, where, avoiding disputed constructions of the Constitution in regard to the commercial clause, the right of the citizen to travel freely, and without State tax, the length and breadth of the land, is maintained on the broad ground of his citizenship, and the authority in the case of Nevada is fully recognized.

We conclude the argument upon the question of the constitutionality of the Act of 1832, ch. 175, s. 8, with the following quotation from the opinion of Taney, C. J. in the passenger cases in 7th Howard, 492.

"A tax imposed by a State for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other States, as members of the Union, and with the objects which that Union was intended to attain. Such a power in the State could produce nothing but discord and mutual irritation, *and they very clearly do not possess it.*"

We have thus, we think, demonstrated the unconstitutionality of the Act of 1832, and we have now to show that it is so closely combined with what is called, in the opinion of the Court of Appeals, the second proposition of the Defendants in Error, that the two cannot be separated.

SECOND POINT.

That there is no sufficient ground presented by the Record, upon which to affirm the decision of the Court of Appeals, apart from the decision of the Federal question.

In the case of *Murdoch vs. Memphis*, decided at this term, the sixth and seventh propositions which it establishes are as follows:

"6. If it (the claim of right) was erroneously decided against the Plaintiff in Error, then this Court must further enquire

whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to sustain the judgment of the State Court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed, without enquiring into the soundness of the decision on such other matter in issue.

"7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that if there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that Court without regard to the Federal question, then this Court will review the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that Court, as the circumstances of the case may require."

We now propose to show that the issue raised here by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case.

The present suit was brought in the Superior Court of Baltimore city for $500,000, money had and received by the Defendant below for the use of the Plaintiff.

Had the matter stopped here, the record, as regards the nature of the claim, would have shown nothing beyond what is to be found in these words:

"The State of Maryland sues the Baltimore and Ohio Railroad Company, for money due and payable by the Defendant to the Plaintiff. For money had and received by the Defendant for the use of the Plaintiff; and the Plaintiff claims damages $500,000.—Isaac D. Jones, Attorney General, &c., &c., &c."

Thus far the case, so far as the Record showed the contrary, was independent of any Federal question.

A bill of particulars being demanded, however, this independence ceased, and the connection between the State and Federal questions was seen at once.

The bill of particulars is as follows:

"The Plaintiff, in answer to the demand of the Defendant for a bill of particulars, says that the claim is for the particulars following, viz., pp. 4 and 5 of Record:

"For five hundred thousand dollars ($500,000) being the one-fifth part of the whole amount of moneys received by the Defendant for the transportation of passengers upon the Washington Branch of the Baltimore and Ohio Railroad, from the first day of January, 1860, to the first day of January, 1870, which said sum was received by the Defendant for the use of the Plaintiff, and was due and in arrears to the Plaintiff at the time of the institution of this action. Isaac D. Jones, Attorney General, &c., &c."

This answer to the demand for particulars made the declaration equivalent to a special declaration in assumpsit on a contract between the Company and the State.

In Maryland, the pleadings are brief, and the practice, in some respects, is peculiar. This is well stated by Judge Dobbin in the opinion pronounced by him on the first trial in the Superior Court.

"Some little difficulty in applying the rules of pleading in this case grows out of our present form of abridged pleading. There is no averment in this declaration whatever of any promise, express or implied; it does not contain the customary averments of a declaration in *indebitatus assumpsit*. In the old form of that action there was an averment that the defendant had received the money, and in consideration thereof, promised to pay it to the plaintiff. There is no averment of any promise, express or implied, in this declaration; but when you take the declaration in connection with the bill of particulars—the bill of particulars stating precisely what is alleged to be the contract in the cause—you make it in effect, a special declaration, or, at least, its equivalent." See opinion of Judge Dobbin, in Record, 13.

The general issue plea imposed upon the Plaintiff below the burden of proving its case "as alleged."

And consequently, the first evidence offered, *see p. 9, Record*, "to sustain the issue on the part of the State," were, as already stated in the beginning of this brief, the Acts of the General Assembly of Maryland containing the charter of the Defendant, all of the Acts of Assembly relating to the construction of a Railroad between the cities of Washington and Baltimore, and to the payment to the Plaintiff by the Defendant of one-fifth part of the whole amount which was received by it for the transportation of passengers on said Branch Road, &c., with all

other Acts of Assembly of Maryland, applicable in the premises; and the Plaintiffs in the State Court also offered evidence tending to shew the acceptance by the Defendant of all said Acts proper or necessary to be by it accepted." The Plaintiff further proved the completion of the road, and the amount of "the said one-fifth" covered by the bill of particulars. And with this evidence the testimony on both sides closed. *See Record*, pp. 9, 14.

It is not easy to understand how, under these circumstances, it can be contended that the decision of the State Court was placed upon some "other and independent ground," to adopt the language of the Supreme Court in the case of *Klinger vs. The State of Missouri*, 13 *Wallace*, 237, than the Acts of Assembly; but for which the Plaintiff below, which offered them in evidence, would have been without a particle of proof to sustain its claim.

In the case in 12th Howard, 124, *Williams, Trustee, vs. Oliver*, where the writ of error was dismissed for want of jurisdiction, the Supreme Court, holding that the question of a violation of a treaty with Spain was not involved in the distribution of certain funds under the insolvent laws of Maryland, say, that "it is not intended, nor to be understood, from these cases, (the case cited and a similar one,) that the question material to the decision to be arrived at must be confined exclusively and specially to the construction of the treaty, Act of Congress, &c., in order to give the jurisdiction; as *this would be too narrow a view of it. Points may arise, growing out of, and connected with, the general question, and so blended with it as not to be separated, and therefore* falling equally within the decision contemplated by the 25th section. The cases of *Smith vs. The State of Maryland*, 6 *Cranch*, 286, and *Martin vs. Hunter's Lessee*, 1 *Wheaton*, 304, 305, afford illustrations of this principle."

In the first of the cases here referred to, Maryland had declared certain confiscations of land to be absolute, without office found. Then came the definitive treaty of peace with Great Britain of 1783, and the State Court decided that the treaty could not affect a title acquired under the confiscation law. The Supreme Court, says Judge Story in the case of *Martin vs. Hunter's Lessee*, 1 *Wheaton*, 360, "entered into an examination of the question whether the treaty could operate upon the title, and agreeing with the Court of Appeals of Maryland, affirmed the judgment."

Reviewing this case in the opinion that he delivered in *Crowell vs. Randell*, 10 *Peters*, 123, Judge Story says:

"In that case it was contended that the (Supreme) Court had no jurisdiction because the cause turned exclusively upon the confiscation laws of Maryland; and that no question relative to the construction of the treaty of peace did or could occur. *But, upon the facts stated on the record*, the only title asserted by the original plaintiff was founded on the confiscation laws of Maryland; and the only title set up by the original Defendant was for a British alien protected by the treaty of peace. If that title was so protected, tnen the Plaintiffs were not entitled to the relief sought by the bill; if otherwise, then the Plaintiffs were entitled to a decree. The State Court decided that the Plaintiffs were so entitled; and, therefore, necessarily decided against the treaty as a protection. The jurisdiction was maintained by the Court upon this posture of the facts, and the decision of the State Court was afterwards affirmed. But the Court said that in order to decide upon the main question it was indispensable to ascertain *what the nature of the title was* to which the treaty was sought to be applied."

Just as in the case at bar, it was necessary to decide the nature of the title to the $500,000 to which it was alleged that, under the Constitution of the United States, the State of Maryland had no title.

The case of Martin *vs.* Hunter's Lessee, was not unlike this; the question being as to the effect of the Treaty of Peace of 1783 upon the title of a British subject to the Fairfax possessions in the northern neck of Virginia. The decision of the Court where the action of ejectment originated, was in favor of the Plaintiff's lessee. This was reversed by the Virginia Court of Appeals, whose decision, in its turn, was reversed by the Supreme Court, in an elaborate and exhaustive opinion, delivered under circumstances requiring the greatest circumspection; for the mandate of the Supreme Court had not been obeyed by the Court of Appeals.

In delivering the opinion of the Court in *Crowell vs. Randall*, Judge Story refers to this case of *Martin vs. Hunter's Lessee*, and says, "There the original case came before the Court (S. C.) upon an agreed statement of facts, upon which the State Court gave judgment against the original Defendant. That judgment was by writ of error reversed by this Court; and when the case came afterwards before this Court upon a second writ of error, the objection was taken that the original case was not within the

25th section of the Judiciary Act. Upon this occasion the Court, after stating the material facts in the agreed case, said, 'it is apparent from this summary explanation, that the title thus set up by the Plaintiff might be open to other objections, but the title of the Defendant in Error (against which the State Court has decided) was perfect and complete, if it was protected by the treaty of 1783. If, therefore, this Court had authority to examine into the whole record, and to decide upon the legal validity of the title of the Defendant, as well as its application to the Treaty of Peace, it would be a case within the express power of the 25th section of the Act; for there was nothing in the record upon which the Court below could have decided *but upon the title as connected with the treaty;* and if the title was otherwise good its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title especially set up or claimed by the Defendants. It would therefore fall within the very terms of the Act.' ''

In neither of these cases was the effect of the treaty of 1783 alone under consideration. It was, however, "*so blended*" (see Williams *vs.* Oliver, 12 Howard, 124, for these words) with the other questions of purely State concern, as to make it necessary for the Supreme Court to consider the whole matter, and for that purpose to take jurisdiction.

So the Plaintiffs in Error hold here—the question of the constitutionality of the Acts requiring the payment into the State Treasury of one-fifth of the gross revenue from passengers on the Washington Branch Road "grows out of and is connected with the general question, and is so blended with it as not to be separated."

In the case of Miller *vs.* Nicholls, 4 Wheaton, 311, the question was as to the priority of the United States as a creditor of Nicholls, over the State of Pennsylvania, also a creditor—a priority which depended under the Act of March 3, 1797, ch. 7, upon Nicholls being in a state of insolvency; a matter that did not appear on the record. In reviewing this case in Crowell *vs.* Randall, Judge Story says: "It is to this state of facts that the language of the Chief Justice was addressed." He added, "had the fact of insolvency appeared on the record, that would have enabled this Court (Supreme Court of the United States) to have revised the judgment of the Supreme Court of Pennsylvania."

And why? it may be asked. Because, upon the *statement of facts*, the State Court must, under these circumstances, have misconstrued the Act of Congress *or disregarded it*, for otherwise they would not have given the judgment which was sought to be reversed." *Crowell vs. Randall*, 10 *Peters*, 394-5.

In the case at bar the record, unlike that in the case cited, which is silent about the fact that could alone have given jurisdiction to the Supreme Court, shews not only the act alleged to be unconstitutional, and therefore proper for the consideration of the Supreme Court. but that it was wholly ignored in its bearing on the decision that was rendered.

Again, in the case of *Williams vs. Wheaton*, 12 *Wheaton*, 117, of the same character as the last, the Supreme Court says: "Had the record shown that this was a case of insolvency, so that the Act of Congress applied to it, *the Act must have been misconstrued, or its obligation denied*, when the Court decreed the money to Pennsylvania; and the Court were of opinion that the Act could not be severed by the omission to refer to it in the judgment or to spread it on the record." *See the reference to this case in* 10 *Peters*, 398.

No better argument in support of the view of this blending of the State and Federal questions, in the present case, can be offered perhaps, than is afforded by the fact already mentioned, that were the question of repugnance to the Constitution of the Acts referred to, not decided, the result would be to perpetuate the operation of an unconstitutional provision of a State law, restrictive of the free transit of the citizens of one State through the territories of another; assuming, of course, that this Court will apply in Maryland the same rule that it has regarded as applicable in Nevada, and relieve, here, as well as there, the travelling public from an improper tax.

Further, in support of this branch of the argument, which requires that we should shew such a "blending" of the State and Federal questions as made it the duty of the Court, in which the action was brought, to take *both* into consideration in forming its judgment, we contend that it did not lie with the Plaintiff below to separate its claim from the foundation on which it rested or the circumstances out of which it arose. We have shewn from the pleadings in the record and the Bill of Exceptions that proof of

these circumstances was, outside of the statistics of the enquiry, the only testimony offered in the case.

It is true that the Defendant in Error insists on the rule that when a special contract has been executed, and nothing remains but the payment over of the stipulated price, the Plaintiff need not plead the special contract, but may resort to *indebitatus assumpsit*. This, however, does not separate the amount of the claim from its origin; and if this last is illegal, the claim falls with it.

Judge Dobbin, in his opinion already referred to, takes this view, and in support of it cites the case of Jones *vs.* Dermott, in 2d Wallace, 1. "That authority," remarks the Judge, "says you could recover in *indebitatus assumpsit*, but you recover through the contract." Again it says: "You must produce the contract upon the trial, and it will be applied as far as it can be traced;" thus showing that althogh *indebitatus assumpsit* may be brought for the purpose of recovering the price, yet in order to show the measure and the ground of that recovery you must resort to and produce this special contract. Now, can the party thus driven to *indebitatus assumpsit* by this illegality of his contract avail himself of it to support what he calls a collateral action? Can he recover through the aid of such a contract? What would that be but yielding the aid of the Courts for the recovery of what is the fruition of the whole illegality, the only result which is at all valuable? If this were so, notwithstanding the Court might have declared the contract itself an utterly wortless one, yet the same result would be produced as if the contract was in all respects valid."

"In the case which we are considering," continues Judge Dobbin, "it is obvious that the Plaintiff cannot make out his case except through the illegal contract—an item of proof so essential to his case that he has been obliged to set it forth substantially in his bill of particulars, and would be obliged to offer it in evidence as the first step in his proof."

In the case of *Swan* vs. *Scott*, 11 *Sergeant & Rawle*, 155. the Supreme Court of Pennsylvania, where the claim was upon a judgment that had been rendered on a bond for the payment of money, given in connection with an illegal land letting, draws the true distinction between cases where the action of the Court is required to enforce a claim founded on an immoral or an illegal consideration—and a claim where the original transaction has passed *in*

rem adjudicatam, and the action is for the amount adjudged. While the Court will refuse its aid in the first case, it will afford it in the second. The language of the Supreme Court is as follows: "The test is whether a demand connected with an illegal transaction is capable of being enforced at law, or whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff *cannot open his case*, without shewing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the Defendant."

This case is referred to as affording the true rule in *Thomas* vs. *Brady*, 10 *Barr*, 170; *Scott* vs. *Duffy*, 2 *Harris*, 20; *Evans* vs. *Dean*, 12 *Harris*, 66; *Fowler and others* vs. *Scully*, 72 *Pa. State Reports*, 456.

So in 4 *Washington, C. C. R.*, 299, *Toler* vs. *Armstrong*, where Judge Washington says: "I understand the rule, as now clearly settled, to be that where the contract grows *immediately* out of, and is connected with an illegal or immoral act, a Court of Justice will not lend its aid to enforce it, and, if the contract be in part only connected with the illegal transaction and growing immediately out of it, though in fact it be a new contract, it is equally tainted by it."

Nor is the doctrine of these cases understood to be disputed by the Court of Appeals of Maryland, for at p. 20 of the Record, it says: "If the foundation of the suit be something collateral to the illegal contract or transaction, and *the plaintiff is not obliged to resort to this in order to maintain the suit*, or to derive any aid from it, then the illegality of the original transaction is not a defence to the suit."

This is stated, perhaps, rather broadly, and might be held to contradict the maxim, *ex turpi causa not oritur actio*, but taking it in its broadest sense, we have shewn that the case at bar comes within its admissions.

Unless the law—the Act of 1832, *ch.* 175, *had been offered in evidence, the action could not have been maintained—and this is the Act alleged to be unconstitutional.*

But, whether or not the action could have been maintained irrespective of the Act of 1832, it pleased the State to make it, by the proof they offered, the foundation of its claim—and the record brings the case therefore within the admission of the Court of Appeals.

That the case at bar falls within the rulings above cited, is evident from an inspection of the record. The Plaintiff below

was not able "to open the case," without shewing as the foundation of it the law alleged to be unconstitutional, and the obligation to pay, which it is contended was perfected by the receipt by the Company of the one-fifth of the passage money, grew unquestionably, and immediately out of the Act of 1832, ch. 175, under which alone the money was received—and whose unconstitutionality is now insisted on.

We think, therefore, we have shewn satisfactorily, that the case at bar could not, when before the Court of Appeals, have stood upon the "independent ground"—that is to say, independent of the Constitution of the United States—which alone could have brought this case within the scope of the 6th proposition in the case of Murdoch *vs.* Memphis. On the contrary, we hold that, in fact, and of necessity, the Federal and State questions were "so blended," to use the term employed in 12th Howard, as to make it impossible to separate them.

Here, strictly the present brief might end, were it not that in the consideration of the constitutional question, the Court might give weight to those views of the Court of Appeals of Maryland in this connection, which hold that the illegal contract with the State being at an end, the fact of the illegality is outside of this question.

The Court of Appeals (Record, p. 21,) says: "It is perfectly clear that when the money has been actually collected by the Company, that part of the transaction which is supposed to be unconstitutional has been completed. The illegal contract has been performed and is at an end, and in no manner enters into the question which subsequently arises between the Railroad Company and the State, as to the duty and obligation of the Company to pay over the money to the State, for whom it has been collected and to whom it belongs. To that part of the Company's contract there remains no constitutional objection, and it is no answer to the suit of the State instituted to enforce its payment by the Company, that it was an unconstitutional tax upon the passengers."

This, however, is far from being true. Are there two contracts between the State and the Company, under the 8th section of the Act of 1832, ch. 175—a contract to do the wrong, and a contract to pay over its fruits? We think the answer is to be found in the opinion of Judge Dobbin, when the case was before him on the first trial in the Superior Court.

"What," says the Judge, "is the unlawful act complained of? Is it to collect from the passenger, and pay over to the State, an illegal tax? The act is unlawful only because this money is exacted for, and is to be paid over to the State. It is lawful to collect from the passenger any sum which he is willing to pay for his transportation, provided that sum is collected for the road as its compensation, and is within the limits allowed by the charter; but it is unlawful to collect from the passenger for the purpose of paying over to the State."

"The action here is brought for the purpose of enforcing the payment over to the State—in effect, to force the consummation of an illegal act, *which only becomes illegal when it is actually consummated.* It is thus that the aid of the Court is invoked for the purpose of perpetrating the illegality without which it cannot be affected. It must be admitted to be against every principle that the Court should thus allow itself to be used."

The vice of the opinion of the Court of Appeals is that it divides into two parts a contract whose parts are necessarily inseparable. The collection it makes one part, the paying over another part. The charter gave the right to collect within the maximum of $2.50. No constitutional question could arise there. The collection for the purpose of paying over and the actual paying over constituted the illegal act, under a contract not to collect only, but to collect *and* pay over:—necessarily we repeat, an entirety.

It is this connection between the agreement and the act done under it which was relied on in discussing the motion to dismiss—this blending together of the two "which now prohibits the severance, which as just said, is the vice of the opinion of the Court of Appeals."

The Court of Appeals (Record, p. 21) quotes Paley, 25, Law Lib. 62, as saying: "If money has been actually paid to an agent for the use of the principal, the legality of the transaction of which it is the fruit does not affect the right of the principal to recover it out of the agent's hands," except, it should be added, in connection with the case at bar, the measure of the principal's right cannot be ascertained without reference to the act alleged to be illegal. In this event, the Court, if it lent its aid to the

recovery, would be *enforcing* an illegal contract, which, it is admitted all round, cannot be done.

The law laid down in Paley, and relied on by the Court of Appeals is not denied. It is to be qualified, however, in the application according to the circumstances of each particular case.

The case of *Tenant vs. Elliott*, relied on by the Court of Appeals, is reported very briefly in 1 Bos. and Pul., 3. It is referred to in the case of *Farmer vs. Russell*, in the same volume, 296, also cited by the Court of Appeals. Here, Eyre, C. J., says, "in *Tenant vs. Elliott*, the Court were of opinion that though the insurance was clearly void, yet, that the broker, into whose hands the money was paid, had nothing to do with the illegality of the contract;" and again, "the case, therefore, is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract."

Surely, viewed in this light, the case of Tenant *vs.* Elliott is not the case at bar. The Company here is the broker, the passenger the Insurance Company, the Plaintiff the State. Instead of the Company, the broker, having nothing to do with the illegal contract, it is the very party to it. Instead of the money here, as in Tenant *vs.* Elliott, having got into the hands of a person "who was not a party to the contract," using the language of C. J. Eyre, it is the party to the contract who is in possession of it; and instead of the law not giving a right to the Defendant by rescinding the contract, in the case at bar, it is the very reverse, for, were the State to rescind the contract to pay it one-fifth, *the whole fare would be the property of the Company, being less than the maximum allowed by law*, as hereinbefore argued.

Carefully examined, therefore, Tenant *vs.* Elliott sustains all the decisions, already referred to, where the blending of the right to collect with the right to recover makes the contract an entirety.

In the same category the Court of Appeals cites Thompson *vs.* Thompson, 7 Vesey, 470, 473. Here parties had agreed that so long as one should have command of a certain ship, he would pay to the other a certain sum per annum. To put an end to such agreements, the East India Company, whose ships they

referred to, paid a round sum to the Captain, who refused to continue to pay the annuity, and a bill was filed to compel him. *Tenant vs. Elliott*, and *Farmer vs. Russell* are both referred to by the Master of the Rolls.

The decision fully sustains all that has been here contended for.

It was admitted that the agreement for the annuity was an illegal one.

"You have no claims," says the Master of Rolls, "to this money except through the medium of an illegal agreement, which, according to the determination you cannot support. I should have no difficulty in following the fund, if you could recover against the party himself. If the case could be brought to this, that the Company has paid this into the hands of a third person for the use of the Plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant vs. Elliott*, I think is an authority for that. But, in this instance, it (the fare) is paid to the party (the State) for there can be no difference as to the payment to his agent (the Company). *Then how are you to get at it except through this agreement?* There is nothing collateral, out of which, the agreement being out of the question, a collateral demand arises. Then you cannot stir a step but through the illegal agreement, and it is impossible for this Court to enforce it."

To have made this case authority for the Defendant in Error, the Court should have decided that, the money having been paid by the E. I. Company to the party bound to pay the annuity as the result of an illegal contract, all enquiry into the question of legality was closed, and the bill should have been sustained and not dismissed. But there, as in the case at bar, the complainant, to support his claim, *had to show the circumstances under which it arose* and rely upon them as the foundation of his action.

In the case of Sharp *vs.* Taylor, 2 Phillips Ch. R., 801, which was an action to recover a moiety of freight money earned on an illegal voyage,--the action was for a share of realized profits, and did not involve the enforcement of an agreement that was illegal, as in the last case.

And again, in the case of McBlair *vs.* Gibbs, in 17th Howard, 238. The facts are altogether different from the facts in the case at bar.

Robert Oliver, in 1819, had purchased a share *from one of the Company* that got up the illegal expedition of Mina, under a contract made in 1816, against Mexico, while yet a province of Spain. Growing out of this, the Company had a claim against Mexico under the convention of 1839.

In the litigation that ensued, the executors of Oliver succeeded, because, in the language of the Court. "The transaction out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of the illegal transactions on which the original contract was founded." Oliver was not a party to the illegal transactions, or in any way connected with them, p. 236. Here, the State *is* a party to the illegal contract which it seeks to enforce.

The cases referred to by the Court of Appeals, in support of the view that "when the money has been actually collected by the Company that part of the transaction which is supposed to be unconstitutional has been completed, the illegal contract has been performed and is at an end, and in no manner enters into the question which subsequently arises" in the action for money had and received—are to be found enumerated in the same order in the case in 17th Howard.

So far, however, from the facts in the case at bar warranting the application of the law of 17th Howard, the State was a party to the illegal contract which it seeks to enforce. Had the State assigned its claim to one-fifth to a third party who had sued the Company for money had and received, the two cases would have been parallel—the State would have occupied the place of Lyde Goodwin, and the assignee the place of Oliver's Executors.

Much reliance was placed in the Court below upon the case of *Brooks vs. Martin*, 2 Wallace, 70, in which all the cases that have here been referred to are cited, and the opinion of Lord Cottenham in the case of *Sharp vs. Taylor*, quoted much at length.

In Brooks *vs.* Martin, the Supreme Court held that Brooks had *operated* a fraud upon Martin in purchasing from him his interest

in an illegal contract for a most inadequate consideration, and required him to account with his partner for a portion of the ill-gotten gains.

There is in this, as in the other cases cited by the Court of Appeals, a marked difference in the facts out of which the questions involved arose, as compared with the case at bar. The illegal contract had unquestionably here been completed, *and there was no occasion for resorting to it as a standard by which to measure the rights of the Complainant.* "There were, then, in the hands of the Defendant," says the Court, "lands, money, notes and mortgages, the results of the partnership business, the original capital for which the Plaintiff had advanced. It is to have an amount of these funds and a division of the proceeds that this bill is filed. Does it lie in the mouth of the partner, who, by fraudulent means, has obtained possession and control of all these funds, to refuse to do equity to his other partner because of the wrong originally done, or intended, to the soldier?"

Brooks vs. Martin was a case of partners seeking to divide a partnership fund. This is the ground on which the Supreme Court rested its decision. "We are of opinion," says the Court, "that Brooks occupied towards Martin a relation of confidence and trust, using his partner as agent, and his brother-in-law, and having entire control of the partnership business; that he took advantage of that position to conceal from Martin the prosperous condition of the concern, and purchased from him his interest for a price totally disproportioned to its real value; and that under such circumstances, it is the unquestionable duty of a Court of Chancery to set aside the contract of sale."

The facts, however, in the case at bar, do not warrant the application of the case of *Brooks vs. Martin.*

In the first place, the relations of the State and the Railroad Company were not those of partners.

In the next place, there was no fraud to justify the interference of equity.

Again, in the case of *Brooks vs. Martin*, there was no necessity to refer to the origin of the transaction to establish the right of the Complainant. Martin's claim was that of a partner seeking to set aside a fraudulent agreement, and to obtain an equal division of a given fund; whereas, in the case at bar, before the State can establish its right to any part of the revenue from

the Washington Road, it must exhibit the unconstitutional Act of 1832, chap. 175, as the foundation of its claim!

Put the case in the form of a dialogue:

"You have moneys of mine in hand," says the State.

"We deny it," replies the Company.

"Have you not received $1.50 a head for a large number of passengers between Baltimore and Washington?" asks the State. "Tell me the number of passengers; and, multiplying it by 30 cents, I will find out what you owe me."

"So we have," say the Company, "but what right have you to any part of it?"

"The Act of 1832, chap. 175, gives me the right," says the State.

The Company's answer is conclusive. "That Act being unconstitutional, can confer no right. *But for the Act, the whole fare would belong to us. It falls within the limit that we are authorized to charge per passenger.* You can claim no part of it unless you first produce the Act: and when that is produced, its unconstitutionality defeats your claim."

The only other case cited by the Court of Appeals in support of their opinion that an action for money had and received will lie in the case at bar, is Waters and others *vs.* the State, 1 Gill, 303. Here it was decided that a collector of taxes will not be permitted to urge in his defence, in a suit for their recovery, that the law under which they were collected was unconstitutional. There are other cases to the same effect.

There is a wide distinction between the two cases.

In the case in 1*st Gill*, the collector had no interest beyond his commission in the money collected.

In the case at bar, the money collected, to the extent of one-fifth of the amount, if it did not belong to the State, belonged to the Company.

It did not belong to the State, because of the want of authority in the State to exact it.

It did belong to the Company, who were entitled to demand, under the maximum of $2.50, whatever sum they pleased, provided the State's portion of it was not reduced below 25 cents *per capita*.

It is apparent, then, that in all these cases, whereon the action for money had and received has been maintained, or equity has

interfered, a state of things has existed altogether different from that presented by the case at bar. And that the error of the Court of Appeals has been an attempt to separate into two parts a transaction which was indivisible. It has, perhaps, made no error in its statement of the law—but it has referred to cases, the facts of which do not justify their application here. The contract between the State and the Company furnished the measure of the claim of the former on the latter—necessitated the introduction of it by the State itself—for without it, it could have no claim whatever, and left the Court no alternative but to enforce an unlawful contract, if it sustained the Plaintiff's claim.

In fine, whether the Supreme Court will take jurisdiction, and whether the action for money had and received can be maintained, turns upon the question—whether the contract between the State and the Company can be divided into two—one a contract to collect, the other a contract to pay over—or whether it is not an entirety, whose parts are so "blended" that they cannot be separated. If so, the question of jurisdiction is answered at once, and the same blending that gives jurisdiction to the Supreme Court, justifies the plea of unconstitutionality in the action for money had and received.

Thus, freed from the objection of the Defendant in Error, the question of unconstitutionality comes fairly and squarely before the Court. This has been already argued.

REVERDY JOHNSON,
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For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1874.

THE BALTIMORE & OHIO RAILROAD COMPANY

VS.

STATE OF MARYLAND.

Additional Separate Argument filed, in February, 1875, by Charles F. M. Gwinn, of Counsel on the part of the Plaintiff in Error, upon the questions presented by the Record.

The Sun Book and Job Printing Office, Balt.

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The Court having overruled the motion made by the State of Maryland to dismiss the Writ of Error sued out in this cause, the questions presented by the Record will now be considered.

The Record will be treated as if it were the history of one trial only. Thus considered it presents the following case.

The State of Maryland brought in the Superior Court of Baltimore City an action against the Plaintiff in Error "*for*

money due and payable by the defendant to the plaintiff, for money had and received by the defendant for the use of the plaintiff." Record p. 4.

In answer to a demand for a bill of particulars, the State alleged that its claim was "*for five hundred thousand dollars, being the one-fifth part of the whole amount of moneys received by the defendant for the transportation of passengers upon the Washington Branch of the Baltimore and Ohio Railroad from the first day of January, 1860, to the first day of January, 1870; which said sum of five hundred thousand dollars was received by the defendant for the use of the plaintiff, and was due and in arrears to the plaintiff at the time of the institution of this action.*" Record, p. 31.

The Plaintiff in Error pleaded that it never was indebted as alleged. Record, pp. 5, 31.

It was agreed in the cause that in all stages thereof, and in all the Courts in which it might come under discussion, the Acts of Assembly might be read from the printed volumes of the laws as though the same were duly proved according to law—Record, pp. 8, 31—and that the Defendant in Error might read any documents which had been printed in this connection by the Baltimore and Ohio Railroad Company. Record, pp. 8, 31.

At the trial the Defendant in Error offered in evidence the Acts of the General Assembly of Maryland, containing the charter of the Plaintiff in Error, and the Acts of Assembly relating to the construction of a railroad between the cities of Washington and Baltimore, and to the payment by the Plaintiff in Error to the State of Maryland of one-fifth part of the whole amount received by it from the transportation of passengers on the said Branch road, and all other Acts of Assembly of Maryland appli-

cable in the premises; and also offered evidence tending to show the acceptance of the Plaintiff in Error of all said acts proper or necessary to be by it accepted; and further proved the construction and completion of the said Branch Road, and its having been put into full operation, under said Acts of Assembly, in the year 1835. Record, p. 31.

The Defendant in Error also offered in evidence statements made from the books of the Plaintiff in Error, showing the said whole amount of money so received by the Plaintiff in Error for the transportation of passengers, and the portion thereof paid by the Plaintiff in Error to the State on account of the said one-fifth, during the period covered by the Bill of Particulars in the cause. Record, p. 31.

The Defendaut in Error also offered evidence to prove that the Baltimore and Ohio Railroad Company had received, during the period of time covered by the Bill of Particulars, one dollar and fifty cents for each passenger carried between the cities of Washington and Baltimore, and at the same rate for shorter distances. Record, p. 32.

It also offered evidence to prove that the proper officer of the Baltimore and Ohio Railroad Company had annually rendered an account, purporting to show the gross amount received by the Company for the transportation of passengers on the Washington Branch Railroad to January 1st, 1868; and had made semi-annual payments in January and July, of each year, on account of the same, to July 1st, 1868. Record, p. 32.

The charter and supplementary acts passed by the Legislature of Maryland in reference to the Washington branch of the Baltimore and Ohio Railroad Company, the Plaintiff in Error,

were public acts, of which the Maryland Courts were bound to take judicial notice.

Bosley vs. *Susquehanna Canal Co.*, 2 Bland, 65.
Agnew vs. *Bank of Gettysburg*, 2 H. & G., 493.
Mayor and City Council of Baltimore vs. *B. & O R. R. Co.*, 6 Gill, 290.

Being such public Acts they must, in like manner, be taken notice of by this Court, irrespective of any agreement in relation to them.

Covington Draw Bridge Company vs. *Shepherd*, 20 Howard, 274.
Owings vs. *Hull*, 9 Peters, 625.
Beatty vs. *Knowler*, 4 Peters, 167.

The Courts of Maryland, and this Court, must both be considered as bound to take judicial notice of the Act of Congress of March 2d, 1831, 4 U. S. Stat. 476, authorizing the construction of the Washington Branch Road within the District of Columbia.

The Baltimore and Ohio Railroad Company was incorporated by the Maryland Act of 1826, ch. 123. It was authorized to construct a railroad from the city of Baltimore to the Ohio river, and also to "make lateral railroads in any direction whatsoever, in connection with the said railroad," 1826, ch. 123, sec. 14. The rate of fare which it was permitted to charge upon its main line or lateral roads was a rate not exceeding three cents per mile for each passenger. 1826, ch. 123, sec. 18.

The general power, thus granted, was sufficient to enable the company to build a lateral railroad, from a point on its main line, at or near Baltimore, to the line of the District of Columbia. It could not, however, extend the road from such point to the city of Washington without authority from Congress.

It applied for that authority, and obtained it. The Act of March 2, 1831, 4 U. S. Stat. at Large, 476, gave the needed power.

This Act, in its preamble, shows that the company claimed that there was vested in it, by its original Maryland charter, (Act of Maryland, 1826, ch. 123) a power to construct a railroad to the line of the District of Columbia, and intended to build such road under that power.

The Act of Congress empowered (section 1) the company to extend into the District of Columbia such lateral railroad as it should construct in Maryland, and gave to the company, in the extension, construction and use of such lateral railroad, within the District of Columbia, all the rights, powers ond privileges which were granted to the company in Maryland by its original charter; that is to say, by the Act of 1826, ch. 123, except in so far as was otherwise provided for in said Act of Congress.

Although the whole case of the company was fitly provided for by the legislation of the State of Maryland and by this Act of Congress, it was not left upon this basis. On February 22d, 1831, a few days only before the passage of the Act of Congress last alluded to, a special Act was passed by the Legislature of Maryland. 1830, ch. 158.

This Act granted specific power to the Baltimore and Ohio Railroad Company (section 1) to construct a railroad from such point on that part of its road which was already constructed and in use, not exceeding eight miles from the city of Baltimore, as the company might deem most convenient, to the line of the State adjoining the District of Columbia, in a direction toward the city of Washington.

It further provided, to quote the precise language of the section, as follows:

"The Baltimore and Ohio Railroad Company shall be entitled to charge and take as compensation for the use of the railroad, which they are authorized to construct by this Act, and for the

conveyance of passengers and transportation of property thereon, at and not exceeding the following rates and amounts, to wit: for conveying any person, or transporting any parcel, or property, any distance whatever, twelve and a half cents; for conveying each person the whole distance between Baltimore and Washington, not exceeding one dollar and fifty cents, and *four* cents per mile for any part of the distance more than three miles.'' 1830, chap. 158, sec. 3.

So much of this section as authorized the company to make the charge of one dollar and fifty cents for conveying passengers the *whole* distance between Baltimore and Washington, and *four* cents per mile over any portion of the road, lying in the district of Columbia, *was wholly void.*

The right to build and operate a railroad, and to take tolls, or fares, is a perogative franchise. *State of Vermont* vs. *Boston, Concord and Montreal Railroad*, 25 Vermont 433, 441, Redfield, C. J.; 1 Redfield's American Railway Cases 86. No State can enable a railroad company to exercise such a franchise, beyond the limits of the territory of such State. If a railroad company, incorporated by one State, seeks to enter territory subject to the control of another State, or subject to the exclusive jurisdiction of Congress, it can only do so upon such conditions as may be prescribed by that State, or by the Congress of the United States, and can exercise, within the limits of such foreign territory, only such powers as are conceded by the law of the place. *Bank of Augusta* vs *Earle*, 13, Peters, 512; *Ohio and Mississippi R. R. Co.* vs *Wheeler, 1 Black, 297; Baltimore and Ohio R. R. Co.* vs *Harris*, 12 Wallace 81; *St. Louis* vs *the Ferry Company, 11* Wallace, 429.

The Court will observe, therefore, that this Maryland Act of 1830 ch. 158, was, in fact, inoperative in so far as it proposed to grant the right to charge, within the District of Colum-

bia, tolls regulated by the law of Maryland, because it was in excess of any constitutional power which the Legislature of that State could have exercised.

The power so exercised, however, was void for another reason. The District of Columbia, by the express terms of the Constitution, art. 1, sec. 8, sub clause 18, is subject, in all cases whatsoever, to the exclusive legislation of Congress. The Maryland Act, in question, in so far as it gave any right to charge and collect tolls in the District of Columbia, was a direct encroachment upon this exclusive power of Congress, and was void, to such extent, under the Constitution of the United States.

Under the Maryland Act of 1830 ch. 158, the company, therefore, in fact, acquired only the right to charge, in *Maryland*, the mileage rate of four cents per mile, prescribed by that Act. It acquired, under the Act of Congress of March 2d, 1831, the right to charge in the District of Columbia, only three cents per mile, that being the mileage rate in the original charter; 1826, chapter 123, sec. 18; and the additional right to charge twelve and a half cents per mile, in the District, for a distance less than four miles. Act of Congress, March 2d, 1831, sec. 4. It had a right to charge the aggregate Maryland and Federal mileage rates to any passenger conveyed the whole distance between Baltimore and Washington, but it could do no more.

The Congress of the United States never afterwards authorized any increase of fare within the District. The rate thus fixed remained the only legal charge. The State of Maryland had no power to increase that scale of charges for the conveyance of passengers within the District of Columbia, which had been thus established by Act of Congress.

Notwithstanding the plain fact that the State of Maryland had no power to authorize the company to prescribe rates of tolls

in the District of Columbia, and that any Act conferring such power was void, to the extent of such grant, under the Constitution of the United States, the Legislature of Maryland made the following additional provision by the Act of 1832, ch. 175, sec. 7:

"*And be it enacted*, That the Baltimore and Ohio Railroad Company shall be entitled to charge and take for conveying each person *the whole distance between the cities of Baltimore and Washington, not exceeding two dollars and fifty cents, and in proportion for every shorter distance.*" 1832, *ch.* 175, *sec.* 7.

This section was void, under the Constitution of the United States, in so far as it fixed the rate of charge for the whole distance between Baltimore and Washington, and a proportionate rate within the District of Columbia, because it conferred a right to exact tolls within a territory, which was wholly beyond the control of the Legislature of Maryland; and because the tolls thus granted, estimated at mileage rates, were in excess of the mileage rates prescribed by the Act of Congress of March 2d, 1831, as proper to be charged in the District of Columbia.

The section in question, therefore, being void in part, took effect, only as a grant of increased mileage rates in the State of Maryland.

The next section of this Act originated the present controversy. It read as follows:

"*And be it enacted*, That the Baltimore and Ohio Railroad Company *shall pay to the Treasurer of the Western Shore of Maryland, on the first Monday in January and July, in each and every year, for the use of the State, one-fifth of the whole amount which may be received for the transportation of passenyers on said railroad by said Company during the six months last preceding;* and it shall be the duty of the President or chief officer of the Baltimore and Ohio Railroad Company, to exhibit on oath or affirma-

tion, to the General Assembly, on the first day of January, or as soon thereafter as the said Assembly shall convene, in each and every year, an account, showing the gross amount received by said Company for the transportation of passengers on said road, and the State's proportion thereof; *provided that the charge for conveying each person the whole distance between the cities of Baltimore and Washington shall not be reduced below the maximum of two dollars and a half, hereinbefore established*, unless by the consent of the General Assembly, or in the recess of that body, by the consent of the Govenor and Council, which consent shall be effective until the end of the session of the General Assembly next ensuing; *and provided, also, that in no case shall the amount received by the State from the Baltimore and Ohio Railroad Company for the conveyance of each person, the whole distance between the two cities, be less than twenty-five cents;* and provided, that at any time and at all times, whenever an application is made to the Legislature by said company to reduce said maximum price, it shall be lawful for the Legislature to make such regulation of charge as it may deem necessary, not reducing the transportation of passengers to the Company below one dollar and fifty cents for the whole distance, and rateably for any shorter distance." 1832, ch. 175, sec. 8.

If this section, taken in connection with the seventh section of the same act, created a contract between the State of Maryland and the company, then it must be assumed that the State impliedly covenanted that it had a right to enable the company to charge tolls upon passengers for the whole distance from Baltimore to Washington. The covenant of the company to pay to the State one-fifth part of the money received from such tolls was, necessarily, a covenant depending upon this grant. That these two covenants were *dependent*, is collected from the "evident sense and meaning of the parties," which is the plain rule for determining the relations of such covenants. *Kingston* vs. *Preston*, Lord Mansfield; cited in *Jones* vs. *Barkley*, 2 Douglass,

690; *Boone* vs. *Eyre*, 1 H. Black 273, note a, Lord Mansfield: *Watchman* vs. *Crook*, 5 G. & J., 255, 256; *Philadelphia, Wilmington and Baltimore Railroad Company* vs. *Howard*, 13 Howard, 358, 359; *Dermott* vs. *Jones*, 23 Howard, 231.

Being dependent covenants they were in any event, discharged as to such parts thereof as were invalid and inoperative. Sheppard's Touchstone, 157. And inasmuch as the State could not grant to the company any right to charge tolls in the District of Columbia, it must be held that the company was under no obligation to pay to the State any portion of the money received for the transportation of passengers within that District. Both parties must be assumed to have contracted with reference to their several powers. The law will imply that the contract was not intended to have greater scope than was permitted by the organic laws controlling the parties, *Wilkinson* vs. *Leland*, 2 Peters, 627, 657.

The Act of 1832, chapter 175, sections 7 and 8, cannot, however, be treated as a contract in which the State and the company only were concerned. It was an arrangement in which both of the parties were interested, but the cost of which fell upon neither. *Railroad Co.* vs. *Jackson*, 7 Wallace, 267. *United States* vs. *Railroad Company*, 17 Wallace, 325, 326, 327.

It will be observed that the Act of 1832, chap. 175, sec. 7, *increased* the fare to be charged to each passenger, traveling between Baltimore and Washington, from one dollar and fifty cents to two dollars and fifty cents, and made a proportionable increase for shorter distances.

This charge, which was made a *maximum* rate by the *seventh* section, was made a *minimum* rate by the eighth section of the same Act.

Omitting for the moment all consideration of the way fares, it appears that the Plaintiff in Error was, therefore, both permitted and required to charge an additional dollar to each person traveling between Baltimore and Washington.

The company was required to pay into the treasury of the State one-fifth part of the two dollars and fifty cents, which it was thus permitted and compelled to charge for the transportation of each traveler between Baltimore and Washington; that is to say, to pay into the treasury of the State *fifty cents* out of the sum received from each one of such passengers.

The increase in fare which the company was permitted and required to make being one dollar upon each passenger so transported between Baltimore and Washington, the Act of 1832, chap. 175, sec. 8, *divided* this increased sum between the State of Maryland and the company.

This was the "*Stute's proportion*," to use the significant language of the eighth section of the Act of 1832, chap. 175.

In order that there might be no doubt, however, as to the right of the State to one-fifth of the actual passage money paid by each passenger, it was further provided that even if the fixed rate of fare was modified by a subsequent agreement between the State and the company, nevertheless the amount received by the State from the company, for the conveyance of each person the whole distance between the two cities of Baltimore and Washington, *should in no case be less than twenty-five cents.*

This specification of the amount of twenty-five cents shows conclusively that the State con idered that the preceding portions of the section secured to it a revenue of fifty cents *from each passenger*. It was the manifest purpose of the section that this fifty cents should be collected from each passenger by the company for the State. This also is the plain theory of the Bill of Particulars, filed in the cause, and made a part of the Record, pp. 4, 5.

Inasmuch as the State of Maryland, by the Act of 1832, chap. 175, sec. 8, *required* the company to charge an additional dollar to each person traveling the whole distance between Baltimore and Washington, and, by the same section, required the Company in fact to pay one-half of this increased rate to the State, it cannot be doubted that it did, by such legislation, impose a tax upon every passenger from Baltimore to Washington upon the Washington Branch Road. *Crandall* vs. *State of Nevada*, 6 Wallace, 48; *Passenger Cases*, 7 Howard, pp. 407, 445, 446, 458, 459, 460, 461, 462; *Brown* vs. *State of Maryland*, 12 Wheaton, 419, 6 Cond. Rep. 562.

The *intention* of sections 7 and 8, of the Act of 1832, chapter 175, must govern the construction of these sections. They were manifestly not intended to impose any tax or burden upon the Plaintiff in Error. They authorized it on the contrary to increase its revenue, and in effect obliged it to make for its own benefit an additional charge of fifty cents to each passenger traveling the whole distance from Baltimore to Washington. This grant of power and obligation were, however, coupled practically by the condition that the remaining fifty cents of the increased charge should be received for the use of the State, and be paid into its treasury.

It is true that the State, by the 1st section of the Act of 1832, chap. 175, became a subscriber to a large amount of the special stock of the Baltimore and Ohio Railroad Company, issued for the construction of the Washington Branch Railroad. 1832, chap. 175, sec. 9.

In so doing, it assumed precisely the same relations to the Company which were occupied by all other persons holding stock therein. *Bank of the United States* vs. *Planters' Bank*, 9 Wheaton, 904; 5 Cond. Rep. 796. It is also true that this stock was paid for by the issue to the Company of the State's certificates of indebtedness; (1832, chap. 175, sec. 1; 1833,

chap. 33;) and that the proportion of the sums received for the transportation of passengers upon this Branch Road, payable to the State, was, by sec. 9 of the Act of 1832, chap. 175, pledged for the payment of the principal and interest of the certificates of indebtedness issued by the State in payment for the special stock for which it had subscribed.

These facts, however, furnish no argument that the State's proportion of the moneys thus received from passengers on the Washington Branch Road was not a tax upon such passengers. They show, on the contrary, that it was the object and purpose of the State to provide a portion of the means required to pay for such stock by collecting it from passengers upon the Washington Branch Road, and not by a payment from its own treasury, or by any uniform taxation of its own citizens, or of property within its jurisdiction.

The tax was upon the *passengers*, and not upon the *corporation*. The corporation was made use of as a convenient and effective instrument for its collection. *United States* vs. *Railroad Co.*, 17 Wallace, 326.

Such a tax could not have been imposed upon the corporation even by its own consent. Article 13 of the Bill of Rights, forming part of the Constitution in force in Maryland when the Acts of 1832, chap. 175, and of 1852, chap. 328, were passed, by providing "that every person in the State should contribute his proportion of public taxes for the support of the government," necessarily required "that all legislative measures for the imposition and collection of taxes should be *uniform*." *State* vs. *Stirling*, 20 Md. 516. This provision was continued in force by

the 15th article of the Bill of Rights of the Constitution of 1867. now the organic law of that State. It cannot, therefore, be insisted by the Plaintiff in Error that sec. 8 of the Act of 1832, chap. 175, as amended by the Act of 1852, chap. 328, *imposed a tax upon this particular Company*, because such a tax, not applicable to other railway companies, would have been in direct opposition to the provisions of the Constitution of the State. *Gilman* vs. *City of Sheboygan*, 2 Black, 515-518.

That which is received for the use of any person is in law regarded as the property of such person at the time it is received. The State of Maryland by the count "*for money had and received,*" upon which it recovered and upon which the Court of Appeals rested its judgment, 34 Md. 363, claimed that the one-fifth part of the moneys paid to the Plaintiff in Error for the transportation of passengers over the Washington Branch Road, did not belong to the Plaintiff in Error, but to the State, and was received by the Plaintiff in Error, at the time when it was received, for the use of the State. If the said one-fifth part of such moneys did not belong to the Plaintiff in Error when received, it was not in law a part of the gross receipts of the Plaintiff in Error, and was therefore neither the subject or measure of any tax upon such gross receipts. The reasoning and authority of the case of the *State Tax on Railway Gross Receipts*, 15 Wallace, 292, 297, Strong, J, do not, therefore, apply to this case. But if said one-fifth part of such money did not belong to the Plaintiff in Error, when it was received, and was not a part of its proper gross receipts, does it not follow that it was a sum collected by the Plaintiff in Error from passengers upon the Washington Branch Road, for the use of the State; that is to say, does it not follow that it was a naked tax levied by the State upon such passengers? If this should be the opinion of the Court, the case is within the reasoning and authority of the *State Freight Tax Case*, 15 Wallace, 271, 282, because the Act of 1832, chap. 175, sec. 3, as amended by the Act of 1852, chap. 328, was a regulation of inter-State commerce, under which the

burden was laid upon persons traveling through or from the State of Maryland to the capital of the Federal Government. *United States* vs. *Railroad Co.* 17 Wallace, 326.

The provisions made by the Act of 1832, ch. 175, secs. 7 and 8, were modified by the following Maryland Acts.

"*Be it enacted*, That the Board of Directors be and they are hereby authorized to reduce the rate of tolls, from time to time, in their discretion, for passengers upon the Washington Branch of said road, by carrying them to and from the respective cities of Washington and Baltimore, or to and from any point or points on said branch road, on the same day, for a less sum than is now authorized; *provided always, that one-fifth part of all such passage money so received be accounted for and paid into the State Treasury.*" 1836, ch. 261, sec. 7.

"*Be it enacted by the General Assembly of Maryland*, That from and after the first day of June next, the Baltimore and Ohio Railroad Company be and they are hereby authorized to reduce the rate of tolls for passengers, from time to time, in their discretion, upon the Washington Branch of the said road, by carrying them to and from the respective cities of Washington and Baltimore, for a less sum than is now authorized; provided, that the charge for a passenger, to and from the said cities, shall not be less than one dollar and fifty cents; *and provided always, that one-fifth of all such passage money so received be accounted for and paid into the Treasury, as now required by law.*" 1844, ch. 103, sec. 1.

"*And be it enacted*, That the said Baltimore and Ohio Railroad Company be and they are hereby authorized to transport passengers on the said Washington road, to and from the respective cities of Washington and Baltimore, for a less sum than is now authorized, in cases where such passengers shall perform the trip, to and from the two cities within the period of three days; *provided always, that one-fifth part of all such passage money, so received, be accounted for and paid into the State Treasury as aforesaid.*" 1844, ch. 103, sec. 2.

"*And be it enacted*, That the said Baltimore and Ohio Railroad Company shall also be authorized and required to transport way passengers upon the Washington Branch, in proportion to the charge from city to city, *with the same proviso, and subject to the same condition as is expressed in the first and second sections of this Act, with regard to passengers from city to city.*" 1844, ch. 103, sec. 3.

"*Be it enacted by the General Assembly of Maryland*, That the power heretofore granted to the President and Directors of the Baltimore and Ohio Railroad Company to reduce the fare, at their discretion, upon all passengers traveling from a point beyond the city of Baltimore to a point beyond the city of Washington, and *vice versa*, is hereby extended in like manner to all passengers traveling from the city of Baltimore to a point beyond the city of Washington, and from the city of Washington to a point beyond the city of Baltimore." 1845, ch. 370, supplementary to the Act of 1844, ch. 103.

These sections show that the Company was anxiously seeking, from time to time, to reduce the fare, and that the State yielded by slow degrees the *specific* tax imposed by the Act of 1832, ch. 175, sec. 8.

In 1852, the Act of 1832, ch. 175, sec. 8, was modified, as follows:

Be it enacted by the General Assembly of Maryland, That the Baltimore and Ohio Railroad Company shall be authorized to regulate the tolls to be paid for the transportation of passengers on the Washington Branch of the said road, in their discretion, not exceeding the maximum heretofore fixed by law; *provided that one-fifth of the passage money received from the said Branch road be accounted for and paid into the State Treasury, as now required by the law.*" 1852, ch. 328.

By this Act the State reaffirmed the right of the Plaintiff in Error to charge, by virtue of the franchise which it had conferred,

the maximum rate of two dollars and fifty cents between Baltimore and Washington, granted by the Act of 1832, ch. 175, sec. 7. The legal effect of the Act, thus passed, was precisely the same as if it had re-enacted the unrepealed portion of the prior Act *in pari-materia*, and had made so much as remained of the 8th section of the Act of 1832, ch. 175, a *proviso* to the exercise of the power to charge tolls, granted to the company by the Act of 1832, ch. 175, sec. 7.

For this reason, after the passage of the Act of 1852, ch. 328, the 7th and 8th sections of the Act of 1832, ch. 175, as amended and remaining in force, so far as the enactment of the State of Maryland could make them law, stood as follows:

And be it enacted, That the Baltimore and Ohio Railroad Company shall be entitled to charge and take for conveying each person *the whole distance between the cities of Baltimore and Washington, not exceeding two dollars and fifty cents, and in proportion for every shorter distauce* (1832, ch. 175, sec. 7); but the Baltimore and Ohio Railroad Company shall be authorized to regulate the tolls to be paid for the transportation of passengers on the Washington Branch of the said road, in their discretion, not exceeding the maximum so fixed by law (1852, ch. 328); provided that the said company shall pay to the Treasurer of the Western Shore of Marylaud, on the first Monday in January and July in each and every year, for the use of the State, one-fifth of the whole amount which may be received for the transportation of passengers on said railroad by the said company, during the six months last preceding; and it shall be the duty of the President, or chief officer of the Baltimore and Ohio Railroad Company, to exhibit, on oath or affirmation, to the General Assembly, on the first day of January, or as soon thereafter as the said Assembly shall convene, in each and every year, an account, showing the gross amount received by the said Company for the transportation of passengers on said road and the State's proportion thereof. (1832, ch. 175, sec. 8.

It will be observed that the proviso that the amount received by the State, for the conveyance of each person the whole dis-

tance between the two cities, should not be less than twenty-five cents each, is treated by the Court of Appeals, in its opinion in the report of the case, in 34th Maryland Rep. 372, as repealed by the Act of 1852, ch. 328. That opinion is conclusive upon this point. *Christy* vs. *Pridgeon*, 4 Wallace, 196.

It is our duty, however, to ask the Court to bear in mind, throughout the whole discussion, the provisions of the Act of 1832, ch. 175, sec. 8, which were repealed by the Act of 1852, ch. 328; that is to say, the provision obliging the Company to charge the fixed sum of two dollars and a half for the conveyance of each passenger between Baltimore and Washington, and a proportionable rate in the District of Columbia, and the provision which declared that the State should, in no case, receive from the company for the conveyance of each person, the whole distance between the two cities, less than twenty-five cents.

The Act of 1832, ch. 175—the provisions in that Act which have been repealed—the repealing Acts, and the Act of 1852, ch. 328, are all in *pari-materia;* and not only the unrepealed provisions of these Acts, but those which have been repealed, may be resorted to in order to determine whether the Act of 1832, ch. 175, sec. 8, as passed, the repealing Acts, and the Act of 1852, construed together, do, or do not, show that the several parts of this entire legislation, remaining in force when this suit was brought, operated to impose a tax upon persons travelling upon the Washington Branch Road, in contravention of the Constitution of the United States.

Rex vs. *Loxdale et al.* 1 Burr. 447.
Bussy vs. *Story*, 4 Barn & Ad. 98, Park, J.
Copeland ex parte, 2 De Gex, Mac & Gordon, 919, 920, Bruce, L. J.

The company remained possessed of the right to charge, for the transportation of passengers, the rate authorized by the Act of 1832, ch. 175, s. 7.

As it is plain, from the legislation to which we have referred, that the obligation to charge, at all times, so high a rate had proved injurious to the Company, the purpose of the Act of 1852, ch. 328, was to permit the Company to lower its rates of transportation whenever, in its judgment, such reduction was expedient.

But the Company was required to pay into the treasury one-fifth of any passage money which it might receive for the transportation of passengers upon the Washington Branch Road.

It cannot be doubted that the purpose of the State in permitting the rate of fare, authorized by the Act of 1832, ch. 175, s. 7, to remain unaltered, was that the Company might have the right to charge any sum within that limit, which would secure to it a larger business and a more certain profit. The State was content to substitute an *ad valorem* duty upon passengers for the *specific* tax which it had previously imposed and collected under the Act of 1832, ch. 175, s. 8. The Company was content to add the amount of this *ad valorem* duty to that rate of fare upon the Washington Branch Road, which would otherwise have yielded to it a sufficient profit, and to collect it and pay it to the State.

This sum, thus of necessity added to the charge made to passengers upon the Washington Branch Road, and collected from them by the Company for the use of the State, would seem to have been an unquestionable instance of taxation of such passengers by the State.

Crandall vs. *Nevada*, 6 Wallace, 35, 48, 49.
United States vs. *Railroad Co.* 17 Wall. 326.

The Company submitted to the obligations imposed by the provisions of the Act of 1832, ch. 175, as amended by the Act of 1852, ch. 328, and continued, for many years, to render accounts and make payments to the State of Maryland of one-fifth of the gross amount which it received for the transportation of passengers on the Washington Branch Road.

During this period of time the legislation in question attracted considerable notice, and made the Company the object of marked hostilty in Congress and throughout the country.

This unforeseen evil was borne without complaint, and it was not until the judgment of this Court was pronounced in the case of *Crandall* vs. *the State of Nevada*, 6 Wallace, 35, that the Company was compelled to examine the question and take such action as was necessary.

The record shows that the Company finally refused to render the accounts and make the payments, required by the Act of 1832, ch 175, sec. 8, as amended by the Act of 1852, ch. 328, and the State, thereupon, brought suit.

In the argument of this cause, upon the motion to dismiss the Writ of Error, the declaration was referred to by the undersigned as made up of two money counts, combined in one, under a provision of 1 Md. Code, art. 75, sec. 22.

It is assumed, however, by the Court of Appeals, in deciding this case, (*State* vs. *B. & O. R. R. Co.* 34 Md. 263,) that the declaration contains only a single count "*for money had and received by the defendant for the use of the plaintiff,*" and it will, therefore, be treated as such single count in this argument. *Christy* vs. *Pridgeon*, 4 Wall. 196.

The Plaintiff in Error, upon the filing of the declaration containing this count, demanded a Bill of Particulars, which was delivered. Record, pp. 4, 5, 31.

Under the practice in Maryland, the Bill of Particulars thus delivered is considered as incorporated in each count of the declaration; and the plaintiff is not allowed to give any evidence not indicated by its terms. Evans' Md. Practice, 2d Ed. 259. *Carter* vs. *Tuck*, 3 Gill, 250. This was the earlier practice in England. 1 Tidd's Practice, 4 Am. Ed. 599.

There was no occasion to except to the Bill of Particulars. It did, in fact, inform the Plaintiff in Error that the claim of the State rested upon the supposed statutory contracts, or obligations, because it stated the substance of these contracts, or obligations; and no more technical description was required. *Walsh* vs. *Gilmor*, 3 H. & J. 408; *Borden Mining Co.* vs. *Barry*, 17 Maryland, 432; *Pennington* vs. *Gibson*, 16 Howard, 81; 1 Tidd's Practice, 3 Am. Ed. 598; 1 Chitty on Plead. m. p. 218. But as the Bill of Particulars thus rendered became, in fact, incorporated in the State's declaration, and as the State was limited to the particular claims thus made, the obligation was imposed upon it to offer in evidence the Acts of Assembly under which it claimed, as its property, the sum of money specified in the Bill of Particulars.

Acting under this obligation, the State offered in evidence the Acts of Assembly to which reference has been made in this argument, and portions of which have been literally quoted for more convenient examination by the Court. Record, p. 31.

The Plaintiff in Error then prayed the Superior Court to give the following instructions (Record, p. 32):

"*First*, That the Act of Assembly of 1832, chapter 175, and "the Acts of Assembly of 1836, chapter 261; 1844, chapter "103; 1845, chapter 370; and 1852, chapter 328, which have "been offered in evidence, so far as they provide that the de- "fendant shall pay to the Treasurer of the Western Shore of "Maryland, on the first Monday in January and July in each "and every year, for the use of the State, one-fifth of the whole "amount that may be received for the transportation of pas- "sengers on the branch road mentioned in said Acts during "the six months last preceding are unconstitutional, because "in conflict with the Constitution of the United States.

"*Second*, That the fact that the said defendant has charged "and received one dollar and fifty cents for the transportation "of passengers for the whole distance over the branch road

" aforesaid, and the fact that the defendant, up to the 30th day " of June, 1868, has accounted with and paid to the Treasurer " one-fifth of the gross receipts from passengers on said road, " do not estop the said defendants from denying the unconstitu- " tionality of said Acts, and that the plaintiff is not entitled to " recover."

The State prayed the Court to grant the two following instructions (Record, pp. 32, 33):

"*First*, The plaintiff prays the Court to instruct the Jury that " even if the Act of Assembly of 1832, chapter 175, as modi- " fied by the subsequent Acts of Assembly, offered in evidence, " is held to impose a tax on passengers travelling on the Wash- " ington Branch Road, and to be, therefore, unconstitutional " under the Constitution of the United States, still the plain- " tiff is entitled to recover under its count for money had and " received, as explained by the Bill of Particulars, one-fifth of " the gross amount which the jury shall find to have been re- " ceived by the defendant for the transportation of passengers " upon the Washington Branch Road, and not already paid " over by the defendant to the plaintiff.

"*Second*, The plaintiff prays the Court further to instruct " the Jury that if they shall find from the evidence that the " defendant accepted the terms of the several Acts of Assembly " read in evidence, relating to the rate of fare for the transpor- " tation of passengers on its road between the cities of Balti- " more and Washington, and relating to the payment to the " State of one-fifth of the said fare, and that the defendant, " between the 31st day of December, 1859, and the 31st day of " December, 1869, received for the said transportation any sum " of money, then the plaintiff is entitled to recover, in this ac- " tion, one-fifth of the sum which the jury may so find to have " been received, and which has not already been paid to the " plaintiff, without regard to any question of conflict between " the said Acts, or any of them, and the Constitution of the " United States."

The Superior Court granted the instructions of the Defendant in Error, and refused those of the Plaintiff in Error. Judgment was entered by the Superior Court for the State. An appeal was taken by the Plaintiff in Error. On such appeal, the rulings of the Superior Court were affirmed by the judgment of the Court of Appeals. Record, p. 34. The writ of error has been sued out to this Court under the provisions of the 25th section of the Judiciary Act, as amended by the 2d section of the Act of Congress of February 5th, 1867.

ERRORS DISCLOSED BY THE RECORD.

The Court of Appeals of Maryland by affirming the refusal of the Superior Court of Baltimore to grant the first instruction asked by the Plaintiff in Error, (Record page 32) unquestionably decided that the Act of 1832 ch. 175, sec. 7, which authorized the Plaintiff in Error to charge, within the District of Columbia, the rate prescribed by that section, was a valid exercise of power under the Constitution of the United States, because, by such ruling, it affirmed the entire constitutionality of the Act of 1832 ch. 175, secs. 7 and 8, as amended by the Act of 1852, ch. 328, and asserted the binding force of those Acts to require the Plaintiff in Error to pay into the Treasury of the State one-fifth part of the *whole* amount received by it for the transportation of passengers over the Washington Branch Road.

By affirming the refusal of the said Superior Court to grant the first instruction asked by the Plaintiff in Error, the Court of Appeals further decided that the eighth section of the Act of 1832 ch. 175, was not a regulation of commerce between the States, nor an attempt to subject to taxation persons who were not within the taxing-powers of the State of Maryland, nor an attempt to control intercourse between the various sections of the United States, but that it was a valid exercise of power under the Constitution of the United States.

By affirming the action of the said Superior Court in granting the first and second instructions of the Defendant in Error (Record pages, 32, 33) it decided that even if sections 7 and 8 of the Act of 1832, ch. 175, as modified by the Act of 1852, ch. 328, were separately, or together unconstitutional, either as creating a contract, or imposing a tax, in contravention of the Constitution of the United States, the Plaintiff, under its count for money had and received, as explained by its Bill of Particulars, could recover one-fifth of the *whole* amount received for the transportation of passengers upon the Washington Branch Road. It therefore decided that one-fifth part of the whole amount received by the Plaintiff in Error *belonged to the Defendant in Error* when it was received; and it further decided against the right of the Plaintiff in Error to retain for its own use all sums received by it for the transportation of passengers within the District of Columbia, under the Act of Congress of March 2d, 1831. See Act of Congress of March 2d, 1867, sec. 2.

The first question to be determined is whether the Court of Appeals of Maryland decided erroneously the Federal question raised in the first instruction asked by the Plaintiff in Error. Record, p. 32. See opinion of Justice Miller upon the motion to dismiss in this cause; and *Murdock et al* vs. *Mayor of Memphis et al*, Miller J. October Term, S. C. 1874.

It is submitted that the first instruction asked by the Plaintiff in Error, Record, p. 32, ought to have been sustained. For even if the Acts of Assembly, referred to in that instruction, could have been treated as a contract, and, therefore, valid in so far as they required payment into the Treasury of the State of one-fifth of the whole amount received for the transportation of passengers *within the limits of the State of Maryland*, they certainly were inoperative in so far as they required payment into the State Treasury of a like proportion of the amount

received for the transportation of passengers in the District of Columbia. The Maryland Act of 1832, ch. 175, sec. 7, as amended by the Act of 1852, ch. 328, conferred upon the Plaintiff in Error no right to charge the maximum rate of two dollars and fifty cents for the whole distance between Baltimore and Washington, and a proportionable rate for shorter distances, because the rates of fare so authorized were, in fact, the grant of a franchise within the District of Columbia, a territory not under the jurisdiction of the State of Maryland, but under the exclusive jurisdiction of Congress. *Bank of Augusta* vs. *Earle*, 13 Peters, 588, Taney, C. J.; *Ohio and Mississippi Railroad Company* vs. *Wheeler*, 1 Black, 295, Taney, C. J.; *Baltimore and Ohio Railroad Company* vs. *Harris*, 12 Wallace, 81, Swayne, J.

These acts not only professed to confer a franchise, which the State of Maryland had no power to grant, but they professed to confer a franchise greater than Congress, in the exercise of its exclusive jurisdiction over the District of Columbia, had seen proper to bestow by the Act of March 2d, 1831.

As the Plaintiff in Error never, therefore, acquired any legal right to charge for the transportation of passengers on the Washington Branch Road, within the territory of Maryland, any other rate than the proportionable mileage rate fixed by the Maryland Act of 1832, ch. 175, sec. 7, and never acquired any legal right to charge for the transportation of passengers within the District of Columbia any other rate than that permitted by the Act of Congress of March 2d, 1831, the consideration for the contract which the State asserts was created by the Act of 1832, ch. 175, sec. 8, partially failed. The State, therefore, if it relied upon the Act of 1832, ch. 175, sec. 8, as amended by the Act of 1852, ch. 328, as forming a contract, could not claim to recover to a larger extent than its grant was operative; that is to say, in any event, it could not claim to recover more than one-fifth of the amount received for the transportation of passengers within the State of Maryland.

Therefore, considered from this point of view only, the first instruction prayed by the Plaintiff in Error, Record, p. 32, was correct; because the Acts of Assembly therein referred to, in so far as they provided for a payment to be made upon a consideration, which was in part unconstitutional and void, were, to the extent to which such consideration failed, inoperative, and did not, therefore, oblige the Plaintiff in Error to pay into the Treasury of the State one-fifth of the *whole* amount received for the transportation of passengers over the entire length of said Branch Road, or any part of the sum received for transporting passengers in the District of Columbia.

That the rights of the State were thus qualified by the partial failure of the consideration, even if the Acts of Assembly in question are treated as creating a contract, clearly appears from the following cases:

Mulliken vs. *Boyce*, 1 Gill, 65.
Cline & Francis vs. *Miller*, 8 Md. 286.
Franklin vs. *Miller*, 4 Ad. & Ellis, 599. 31 E. C. L. 151, Littledale, J.
Lucas vs. *Godwin*, 3 Bingham N. C. 737, Bosanquet, J. 32 E. C. L. 313.
Mondell vs. *Steel*, 8 M. & W. 870, Parke, B.
Chapel vs. *Hicks*, 2 Cr. & M. 214, Lyndhurst C. B.

But the first instruction asked by the Plaintiff in Error (Record, p. 32,) ought to have been maintained for broader reasons.

The Act of 1832, chap. 175, sec. 8, as amended by the Act of 1852, chap. 328, imposed a tax upon all persons traveling on the Washington Branch Road.

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid." Case of the State Freight Tax Case, 15 Wallace, 272.

The revenue provided for by the Maryland Acts of 1832, ch. 175, secs. 7 and 8, stood, as has been shown, precisely upon the same basis which it would have occupied if the State had declared that the Plaintiff in Error should collect, for the use of the State, fifty cents from every passenger traveling upon the Washington Branch Road, between Baltimore and Washington, and a proportionable sum from every person traveling a shorter distance on said road.

The revenue provided for by the Act of 1832, ch. 175, secs. 7 and 8, as amended by the Act of 1852, ch. 328, stood precisely upon the same basis which it would have occupied if the State had declared that the Plaintiff in Error should collect, for the use of the State, from every passenger transported over the Washington Branch road, a sum equal to one-fifth of the whole amount of the charge made by the Plaintiff in Error for such transportation.

The Plaintiff in Error may certainly insist upon these two propositions. They are conceded by the count in the declaration "*for money had and received,*" For this count rests upon the theory that the State of Maryland was legally entitled to the money which it claims *at the time it was received* by the Baltimore and Ohio Railroad Company. 5 Saund. Plead. and Ev. 5 Am. Ed. m. p. 372, and cases already cited.

If the Acts in question had been thus worded, they would undoubtedly have been construed to impose a tax, for the use of the State of Maryland, upon all persons travelling upon a road connecting the city of Baltimore with the National Capital; and no attempt probably would have been made to maintain the validity of such legislation.

Crandall vs *Nevada*. 6 Wallace, 35, 43—49.
United States vs. *Railroad Co*. 17 Wallace, 326.

The Acts in question produced, as has been shown, precisely the same result as if they had been thus worded.

Brown vs. *State of Maryland*, 12 Wheat. 419, 6 Cond. Rep. 562.

They enabled the State of Maryland to impose a tax upon persons who were not citizens of that State, and were not domiciled, temporarily even, within its territory, and who were in no wise subject to its taxing power. *McCulloch* vs. *State of Maryland*, 4 Wheat, 316. 4 Cond. Rep. 486, 487. *State Tax on Foreign-Held Bonds*, 15 Wallace, 319. *Tappan* vs. *Merchants National Bank*, 19 Wallace, 499. *The Delaware Railroad Tax*, 18 Wallace, 229.

They were, to the extent to which they conferred this power, unconstitutional and void, because "the power of taxation, however vast in character and searching in its extent, is necessarily limited to subjects within the jurisdiction of this State." *McCulloch* vs. *State of Maryland*, 4 Wheat, 316, 4 Cond. Rep. 486, 487. *Ogden* vs. *Saunders*, 12 Wheat. 369, 6 Cond. Rep. 534. *Railroad Co.* vs. *Jackson*, 7 Wallace, 266. *St. Louis* vs. *Ferry Co.* 11 Wallace, 430. Story on Conflict of Laws, sec. 20. *State*

Tax on Foreign-Held Bonds, 15 Wallace, 319. *Tappan* vs. *Merchants National Bank*, 19 Wallace, 499. *The Delaware Railroad Tax*, 18 Wallace, 229.

They enabled the State of Maryland to exact money from citizens of other States, passing through that State on their way to the National Capital or to other States, and in fact made the payment of such money a condition of the privilege of travel by that particular postal route; thus impairing the right of ingress and egress into and from every State and Territory, which was intended to be secured, absolutely, to every citizen by the Constitution of the United States. *Case of State Freight Tax*, 15 Wall. 272.

They imposed this direct pecuniary charge upon every person in the service of the United States, proceeding to or from Washington, in the transaction of the public business; and to this extent taxed the Government for the use of the State of Maryland.

They imposed a tax, for the use of the State of Maryland, upon persons residing in the District of Columbia, who were obliged to travel upon the road in question, within the limits of the District, and who in such travel, may not have crossed the limits of the State of Maryland. *State Freight Tax Case*, 15 Wall. 281.

Such, unquestionably, were the effects of the Act of 1832, ch. 175, as originally passed, and such remained its effects for many years after the passage of the Act of 1852, ch. 328; for

the Court will take judicial notice that the railroad, affected by this legislation, remained the only railway route to the National Capital, until the Baltimore and Potomac Railroad was constructed within the District of Columbia, under the Act of Congress of February 5th, 1867, 14 U. S. Stat. at Large 387, and its supplements.

The effect of these Acts, indeed, remains unchanged, because the same proportionable tax is still imposed by these unrepealed laws upon all persons journeying over any part of the Washington Branch Railroad.

These Acts, in the particulars referred to, are, as has been before said, inoperative and void, under the Constitution of the United States, for the general reason that they assume a control over the intercourse between the various sections of the United States, and thus limit a privilege belonging to the citizens of the several States, which it was the purpose of the Constitution to leave subject to no other supervision than the national authority. For this reason alone the legislation referred to would be invalid, even if it were not open to the specific objections already made.

Cooley vs. *Board of Wardens*, 12 Howard, 319.
Steamship Company vs. *Port Wardens*, 6 Wallace, 32.
Hinson vs. *Lott*, 8 Wallace, 182.
Woodruff vs. *Parham*, 8 Wallace, 138.
Almy vs. *State of California*, 24 Howard, 169, 173.

"It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him. If the Act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country

by the common and usual modes of public conveyance, to pay a specific sum to the State, was not a tax upon the right thus exercised."

Crandall vs. *Nevada*, 6 Wallace, 39.

Legislation, marked by such incidents, cannot become unobjectionable, because it is embodied in the forms of a contract. "*Pacta privata jure publico derogare non possunt.*" *See Booth* vs. *Bank of England*, 7 Clark & Finnelly, 500, S. C. 6 Bingham, N. C. 415; Tindal, C. J. 37 E. C. L. Rep. 439.

The cases of *Pollard's Lessee* vs. *Hogan*, 3 Howard, 223, *Goodtitle* vs. *Kibbee*, 9 Howard, 478, and *Doe* vs. *Bebee*, 13 Howard, 26, establish the proposition that the United States have no constitutional power to exercise the right of eminent domain within the limits of a State, except in cases where that power is granted by the Constitution of the United States. Such right belongs only to the State governments.

The railroads of the country are now, and probably always will be, the principal means for carrying on "commerce among the several States." They can be constructed in any State only by the delegation to the respective corporations engaged in building them of the right of *eminent domain*

A State cannot establish a station upon its borders and prohibit the citizen of another State from crossing its limits, unless he shall pay a specified sum into its treasury. *State Freight Tax Case*, 15 Wallace, 276. Can it compel, by indirect means, a payment which it cannot exact by direct and positive legislation? Having the exclusive right to grant those powers, which are essential to the construction and use of railways, can it make such grant upon the condition that the corporation receiving it shall collect for the use of the State a like sum from every person who enters the State by its railway?

These acts, in so far as they required the payments in question, were unconstitutional, because they were, in fact, regulations of a species of commerce among the several States which was subject only to the jurisdiction of the Congress of the United States, and was subject to this jurisdiction only to a very limited and qualified degree and extent.

"Commerce undoubtedly is traffic, but it is something more: it is *intercourse*. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons* vs. *Ogden*, 9 Wheat, 1, 5 Cond. Rep. S. C. 567. Story on Const. 1057.

"Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. *Ib.* p. 569.

"If Congress has the power to regulate 'foreign commerce,' that power must be exercised wherever the subject exists." * * This principle is, if possible, still more clear when applied to commerce among the several States. * * * The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States." *Ib.* 570.

* * "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single Government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." *Ib.* 571. *Corfield* vs. *Coryell*, 4 Wash. C. C. R. 379.

It is not necessary, for the purposes of this argument, to define the exceptions to the rule that commerce among the several

States is within the exclusive control of Congress. It is enough to say "whatever subjects of this power are, in their nature, *national*, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Cooley vs. *Board of Wardens of Philadelphia*, 12. Howard, 319, Curtis, J.

Case of State Freight Tax, 15 Wall. 279, 280.

The Constitution did not confer the right of intercourse between State and State. *Gibbons* vs. *Ogden*, 5 Cond. Rep. 578. This was a right, in part existing under the law of nations, and in part specifically secured by the fourth article of the original articles of Confederation, adopted in 1778. That provision was that "the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."

The purpose of article 4, section 2, of the Canstitution of the United States was simply to confirm a right founded upon the old compact, and upon those principles of international law which are of universal force, and to prevent any interference with its exercise, by placing the power to regulate commerce within the exclusive control of the Congress of the United States.

The right of the people of each State to have free ingress to and regress from any other State is, considering the system of government under which we live, a subject which is in its nature more "national" than any other that can be imagined. For commerce among the several States is not the passage of loaded vessels from port to port, or of freight trains from State to State. It is *intercourse* between the people of the States of which these vessels and railway trains are only, in small part, the result. If this actual personal intercourse could be taxed or impeded by State legislation, as was attempted by the laws held unconstitu-

tional in the "Passenger Cases," 7 Howard, 283, 407, 445, 446, 458, 459, 460, 461, 462, "commerce among the States" would be under the complete control of every State whose territories were crossed by the great highways of the country. See *Ward* vs. *Maryland*, 12 Wallace, 430, Clifford, J.

We may, therefore, it is respectfully submitted, assert that the Act of 1832, chapter 175, sec. 8, as amended by the Act of 1852, chapter 328, in so far as it required the Plaintiff in Error to pay to the State of Maryland one-fifth part of the moneys received for the transportation of passengers between the State of Maryland and the District of Columbia, or in any part of the District of Columbia, was wholly void, because in contravention of the Constitution of the United States.

There is another specific, and, as we believe, conclusive, objection to the ruling of the Court of Appeals upon the first instruction (Record, page 32,) asked by the Plaintiff in Error.

That Court rejected the prayer in question, upon the ground that the Maryland laws complained of imposed a tax upon the *corporation*, and not upon the *passengers*, and, therefore, were not subject to any constitutional objection.

The Acts in question show that the tax was paid by the passengers, and that the State intended the passengers should pay it. The case of *Railroad Co.* vs. *Jackson*, 7 Wallace, 267, Nelson, J., recognizes that in such a case the Court cannot do otherwise than consider that the tax is imposed upon the passenger. *United States* vs. *Railroad Co.* 17 Wallace, 325, 326.

If the propositions involving the partial invalidity of the Act of 1832, ch. 175, sec. 7, and the invalidity of the Act of 1852,

ch. 328, heretofore submitted, are correct, there was unquestionably also error upon a Federal question in the affirmance by the Court of Appeals of Maryland of the second instruction asked on the part of the State of Maryland. Record, p. 33. That instruction cannot be held to be correct, except upon the assumption that the Baltimore and Ohio Rairload Company did, in fact, acquire under the Maryland Act of 1832, chapter 175, section 7, the right to charge the *whole fare*, which it was, by that act and section, authorized to charge. By affirming this instruction, the Court of Appeals necessarily decided against the validity of the only Act, the Act of Congress of March 2d, 1831, under which the Plaintiff in Error had the right to make any charge for the transportation of passengers in the District of Columbia.

There is also error in the first instruction prayed by the State of Maryland, and affirmed by the Court of Appeals. Record, p. 32. It *assumes* that the fares received by the Plaintiff in Error upon the whole road between Baltimore and Washington were collected under the authority of the Maryland Acts; and in effect, therefore, wholly denies the validity and operation of the Act of Congress of March 2d, 1831, under which only the Plaintiff in Error could lawfully make any charge for the conveyance of passengers within the limits of the District of Columbia.

If the Court of Appeals of Maryland committed error in deciding the Federal questions raised by the first instruction asked by the Plaintiff in Error, or by the first and second instructions asked by the Defendant in Error, then its judgment must be reversed, because the issues raised by the questions of Federal law were of such controlling character that their correct decision was necessary to any final judgment in the case. *Murdock et al.* vs. *Mayor of Memphis et al.* October Term S. C. 1874.

This is especially true of so much of the decision of the Maryland Court of Appeals contained in the first and second instructions of the Defendant in Error (Record, pp. 32, 32,) as affirms that the Defendant in Error could recover under the count for money had and received, whether the Act of 1832, ch. 175, as amended by the Act of 1852, ch. 328, was constitutional or not.

If this Court should be of the opinion that the Act of 1832, ch. 175, secs. 7 and 8, as amended by the Act of 1852, ch. 328, is unconstitutional in the particulars already specified, then under the rulings in *Murdock* vs. *Mayor of Memphis et al.* this Court must decide whether, under the pleadings in this cause, the Defendant in Error could have recovered, if the State Court had held the Act of 1832, ch. 175, secs. 7 and 8, as amended by the Act of 1852, ch. 328, to be unconstitutional.

It is respectfully submitted that in such case no recovery could have been had under the count "for money had and received."

The declaration taken in connection with the Bill of Particulars, with the Acts of Assembly offered in evidence, and with the Bill of Exceptions, conclusively shows that the Defendant in Error sued upon a statutory contract, created by the Act of 1832, ch. 175, secs. 7 and 8, as modified by the Act of 1852, ch. 328; and that it could not have recovered judgment unless the Court of Appeals had erroneously decided these Acts to be valid under the Constitution of the United States.

A count "*for money had and received*" lies only *where the plaintiff was legally entitled to the money at the time it was received by the defendant.* 2 Saund. Plead. and Ev. 5th Am. Ed. m. p. 372; *Manifold* vs. *Morris*, 5 Bingham, N. C. 424, 35 E. C. L. 160, Tindal, C. J.; Chitty on Pleading, 2 London Ed. m. p. 341; *Scott* vs. *Surman*, Willes, 400; *Cary* vs. *Curtis*, 3 Howard, 247, 248; *Jewett* vs. *Cunard*, 3 Wood & Minot, 322, 323; *Allen* vs. *McKean*, 1 Sumner, 327; *Bradshaw* vs. *Bradshaw*, 5 M. & W. 341, Lord Abinger; *Vrooman* vs. *McKaig*, 4 Maryland, 454.

This was the express theory of the Bill of Particulars, (Record, pp. 4, 5,) which is, as has been said, considered to be incorporated in the declaration, under the practice in Maryland, (Evans' Practice, 2d Ed. 259, *Carter* vs. *Tuck*, 3 Gill, 250,) because it states that the sum claimed was *received by the Plaintiff in Error for the use of the State of Maryland*—thus asserting in this case the theory of all actions for money had and received, namely, that the whole sum of money thus claimed never was the money of the Plaintiff in Error, but belonged to the State of Maryland at the time it was received by the Plaintiff in Error.

This count places the question upon its true basis. It concedes the fact that the effect of the Act of 1832, ch. 175, secs. 7 and 8, as modified by the Act of 1852, ch. 328, was to require every passenger traveling on the Washington Branch Railroad, to or from the city of Washington, to pay to the State of Maryland, *as its money*, one-fifth part of the fare which such passenger was charged for transportation upon that road, whether such passenger was a citizen of that State or not. And it concedes the further fact that the effect of this legislation was to impose a like burden upon every person traveling upon that part of the road lying in the District of Columbia, although he may not have been a citizen of Maryland, and may not have traveled upon any part of that road situated beyond the borders of the District of Columbia.

The very form of this count is, therefore, a concession by the Defendant in Error that the Acts of Assembly in question imposed a tax, for the benefit of the State of Maryland, upon all persons traveling upon the Washington Branch Railroad. *United States* vs. *Railroad Co.* 17 Wall. 326, 327.

It follows that there can be no question that this count necessarily involved the validity, under the Constitution of the United States, of the Acts of Assembly upon which it was founded; for certainly the right of the Defendant in Error to recover the money, for which it obtained a judgment, upon the theory that such money belonged to it at the very time when it was paid to the Plaintiff in Error, depended, altogether, upon the validity of the Acts of Assembly which gave it a right to such money.

Unless the Acts of Assembly in question were valid in the particulars referred to, the whole money received from passengers belonged to the Plaintiff in Error.

The Record shows that the money in question was in part received by the Plaintiff in Error, under the authority of certain Acts of Assembly, which the Defendant in Error offered in evidence; and the Court will take judicial notice that it was in part received under the authority of the Act of Congress of March 2d, 1831. There was no contract or obligation to pay any part of this money to the State of Maryland, except such contract as was created, or such obligation as was imposed, by the Act of 1832, ch. 175, sec. 8, as modified by the Act of 1852, ch. 328. The right of the State to recover any part of this money, depended altogether upon the construction and validity of the contract created, or obligation imposed, by such Acts of Assembly.

No question can exist as to the right of the Plaintiff in Error to have received this money. The Defendant in Error cannot deny such right, because it affirms that the Acts of Assembly, conferring such right, were valid in every particular. The Plaintiff in Error does not deny it, because such Plaintiff claims that the money was received under the authority of portions of the Maryland statutes, which were valid and operative, and under the authority of a valid Act of Congress.

Both parties to this litigation being, therefore, agreed that the whole sum of money received for the transportation of passengers, between Baltimore and Washington, and in the District of Columbia, was rightfully received by the Plaintiff in Error, it follows that the Defendant in Error, could recover only under the statutory provisions which it relies upon as creating a contract, or obligation.

The case admits of no presumptions of law. The portions to be paid, and the times at which they were payable, were matters of positive enactment. The State could not recover anything, until it showed what sum of money had been received; and then it could recover only the particular portion of that sum allotted to it by the Maryland Acts in question; and it could recover that portion only at the expiration of certain fixed periods of time. The State had, therefore, no right to the money claimed in this action, except such right as it could assert under the provisions of the Acts of Assembly in question. It could recover only to the extent to which the obligation imposed by these Acts was valid; and if these Acts imposed no obligation, it could not recover at all. *Simpson* vs. *Bloss*, 7 Taunton, 246, Gibbs, C. J. 2 E. C. L. 90; *Fisher* vs. *Bridges*, 3 Ellis & Black-642, 77, E. C. L., 643, Jervis, C. J.; *Thompson* vs. *Thompson*, 7 Vesey, (Sumner's,) 470.

This case must not, therefore, be confounded with the class of cases to which *Tennant* vs. *Elliott*, 1 B. & P. 3, and *Farmer* vs. *Russell*, 296, belong, for it in no wise resembles them; nor can it especially be considered as belonging to the class of which *McBlair* vs. *Gibbs*, 17 Howard, 236, 237; *Brooks* vs. *Martin*, 2 Wall. 70, and *Planters' Bank* vs. *Union Bank*, 16 Wall. 500, are examples.

Tenant vs. *Elliott*, 1 B. & P. 2, was the case of a broker who had received from the underwriters the proceeds of a policy of insurance paid to him for the use of the plaintiff for whom the policy had been affected. The broker was not in any way a party to the contract,—had no interest whatever in the fund,—and was not authorized by the insurance company to withold the money. The insured was held to be entitled to recover it upon the proof given that the broker received the particular sum for his use, and was not obliged, in making out his case, to rely upon the illegal policy.

Farmer vs. *Russell*, 1 B. & P. 295, was a case where carriers of counterfeit money received money from the person to whom such counterfeit money was consigned, and refused to pay it to the shipper. In this case Eyre, C. J. was not satisfied that the carriers were parties to the illegal contract, *and for this reason*, held that the shipper could recover the unpaid money from them.

In neither of these cases had there been any original express contract between the plaintiff and defendant, out of which the fund had accrued. In neither of these cases had the defendant any right whatever to any part of the fund in controversy. The particular fund had been placed in the hands of each one of these defendants by *third parties*, that it might be paid over to the respective plaintiffs, and the plaintiff was, in each case, obliged to prove no more than this to entitle him to recover.

In *McBlair* vs. *Gibbs*, 17 Howard, 235, 236, the assignment to Oliver was "subsequent, collateral to, and wholly independent of, the transaction, on which the principal contract was founded. Oliver was not a party to these transactions, nor in any way connected with them." This case was in strict conformity with the rule laid down by Eyre, C. J. in *Farmer* vs. *Russell*.

Brooks vs. *Martin*, 2 Wallace, 70, 70-87, arose upon a bill filed for a general account of profits, arising out of a partnership formed to conduct an illegal business, and neither party had any legal right to the original fund, which had been created by this means.

In *Planters' Bank* vs. *Union Bank*, 16 Wallace, 499, the proceeds of the Confederate bonds had been carried by the Defendant to the credit of the Plaintiff, and an implied promise to account for them had arisen upon this new undertaking.

The cases of *McBlair* vs. *Gibbs*, 17 Howard, 236, 237; *Brooks* vs. *Martin*, 2 Wallace, 81, and *Planters' Bank* vs. *Union Bank*, 16 Wallace, 483, only decide that where two parties have consummated an illegal transaction, and thus acquired a fund in which they have a common and ascertained interest, and one has no better right or title to that fund than the other, and neither party has any legal right to any part of it, the Court, if part of the fund has been carried to the credit of the plaintiff, *and if it is not called upon to give aid to the illegal contract*, (*Planters' Bank* vs. *Union Bank*, 16 Wallace, 499,) will disregard the maxim "*Potior conditio est possidentis*," and compel the parties to divide such fund, according to the terms upon which they agreed before they acquired it, however illegal may have been the means by which it was acquired.

It is not, however, made the duty of the Plaintiff in Error to controvert the inferences which may be drawn by the Defendant in Error from the cases of *Brooks* vs. *Martin*, and *Planters' Bank* vs. *Union Bank*. The rulings of the Supreme Court in those cases are not applicable to the case under discussion. The plaintiff in Error had, under the provisions of the Maryland Act of 1832, chapter 175, sec. 7, a right to charge and receive the proportionable rate in the State of Maryland, which it collected, and it had, under the Act of Congress of March 2, 1831, a right to charge and receive the proportionable rate in the District of Columbia, which it collected. It received all the money which it collected, under lawful authority, and in the exercise of a lawful business; and during the time covered by the claim of the State of Maryland had carried no part of the sum so received to the credit of that State. The Defendant in Error, relying upon an illegal agreement, cannot, because of this illegal agreement, be admitted to a share of the moneys lawfully received by the Plaintiff in Error, and retained as its own property.

There is no estoppel when the question arises upon the construction of a contract. The Plaintiff in Error had a right to every dollar which it received for the transportation of passengers on the Washington Branch Road, unless the provisions of the Act of 1832, chapter 175, section 8, and of 1852, chapter 328, imposing upon it the obligation to levy and collect a part of this charge upon passengers for the use of the State, are construed as grounded upon a valid exercise of power by the State, under the Constitution of the United States.

The instructions asked by the State and affirmed by the Court of Appeals are objectionable for other reasons. We state their substance in the very language of the Court which affirmed them.

These prayers say the Court of Appeals (*State* vs. *B. & O. R. Co.* 34 Md. 362, 363,) "assume, for the purposes of the present

case, that the money collected from passengers, for tne use of the State, was an unconstitutional exaction from them, as alleged by the defendant, and yet assert the proposition that this furnishes no defence to the present suit; and that the plaintiff, is entitled to recover one-fifth of the gross sum actually received for the transportation of passengers, and not already paid to the plaintiff, without regard to any question of conflict between the Acts of Assembly and the Constitution of the United States. Or, to state the proposition more clearly, that the railroad company, having collected certain moneys from passengers, for the use of the State cannot be allowed to retain the money, and refuse to pay it to the party to whom it belongs, on the plea that the persons from whom it was collected were not legally bound to pay it."

The Court of Appeals concedes (34 Md. pp. 363, 364) that a plaintiff cannot, by resorting to an action upon an implied assumpsit, enforce a contract which could not be enforced by an action brought on the contract itself. But it iusists that if the foundation of the suit be something collateral to the illegal contract or transaction, and the plaintiff is not obliged to resort to the illegal transaction, or to derive any aid from it, in order to maintain his suit, then the illegality of the original transaction is not a bar to such suit.

The Court of Appeals, interpreting the contract supposed to exist between the State and the Plaintiff in Error, (same case, p. 365,) says that it is perfectly clear that when the money was actually collected by the Company, the unconstitutional part of the transaction was completed; and the objection that such part was unconstitutional, in no manner affected the obligation of the Company to pay to the State the money collected for the use of, and belonging to, the State. 34 Md. 365.

The Court of Appeals, therefore, decides, as plainly as it can, that if the transaction was illegal, and the State was ebliged to resort to such transaction, or to derive any aid from it in maintaining its suit, then it cannot recover in such suit.

This ruling is unquestionably law. It was settled by Lord Mansfield, in *Holman* vs. *Johnson*, Cowper, 343, in 1775.

It was reaffirmed by Eyre, C. J. in 1798, in the case of *Farmer* vs. *Russell*, 1 B. & P. 297, 298, a case which has been to some extent misunderstood in subsequent decisions. Eyre, C. J. in that case, says: "*If I could be satisfied that the defendant in this case ought to be considered as insuring the performance of an illegal contract, I should be of the opinion that a demand, necessarily connected with an illegal contract, and tending to facilitate the exaction of it, would be vitiated by that contract.*"

It was reaffirmed in *Simpson* vs. *Bloss*, 7 Taunton, 246, 2 E. C. L. 90, 91, Gibbs, C. J.; *Fivaz* vs. *Nicholls*, 2 Manning Grang. & Scott, 512, 52 E. C. L. Tindal, C. J. 514, 515, Creswell & Earle, JJ.; *Thompson* vs. *Thompson*, 7 Vesey Jr. Sumner's, 473, Sir Wm Grant.

This ruling has been recognized as the law of this Court. *Armstrong* vs. *Toler*, 11 Wheat. 258, 6 Cond. Rep. 305; *Bank of U. S.* vs. *Owens*, 2 Peters, 538; *Bartle* vs. *Coleman*, 4 Peters, 188, 189; *Harkness* vs. *Underhill*, 1 Black, 325; *Coppell* vs. *Hall*, 7 Wallace, 558; *Brown* vs. *Torkington*, 3 Wallace, 377; *Planters' Bank* vs. *Union Bank*, 16 Wallace, 499.

The Court of Appeals, with this opinion as to the law applicable to the case, ought to have rejected the very propositions which it approved; for the test being, as that Court has held, and as was held by Gibbs, C. J. in *Simpson* vs. *Bloss*, 7 Taun.

248, 2 E. C. L. 90, 91, and by this Court in *Planters' Bank* vs. *Union Bank*, 16 Wall. 499, 500, whether the State had made out its claim without deriving aid from the illegal transaction to establish its case, it was perfectly clear from the Record that it had not. For the Record shows that the State relied on the transaction, alleged to be illegal, as the very foundation and ground work of its whole proceeding. It opened its case by offering in evidence, as the basis of its claim, the very Acts which were resisted as unconstitutional, and it had, manifestly, no claim whatever to the money in question, unless the Acts of Assembly on which it relied were constitutional and valid.

For the reasons given, it is submitted that the judgment in this case ought to be reversed.

CHARLES J. M. GWINN,
On the part of the Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1874.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND,
DEFENDANT IN ERROR.

Brief of the Counsel for Defendant in Error.

BOYLE & SON, PRINT.

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND,
DEFENDANT IN ERROR.

Brief of the Counsel for Defendant in Error.

This is an action of *indebitatus assumpsit*, brought originally in the Superior Court of Baltimore City, by the State of Maryland against the Baltimore and Ohio Railroad Company, on the 6th of May, 1870. (Record, p. 4.) The declaration (p. 4) contained only two brief counts—the first for money due and payable: the second for money had and received. In answer to a demand of the Defendant (below) for a bill of particulars, the following was filed by the State. (Rec. 4, 5.)

"The Plaintiff in answer to the demand of the Defendant for a bill of particulars, says that its said claim is for the particulars following, viz: for five hundred thousand dollars, being the one-fifth part of the whole amount of moneys received by the Defendant for the transportation of passengers upon the Washington Branch of the Baltimore and Ohio Railroad, from the first day of January, 1860, to the first day of January, 1870; which said sum of five hundred thousand dollars was received by the Defendant for the use of the

Plaintiff, and was due and in arrears to the Plaintiff at the time of the institution of this action."

By the Maryland, as by the English practice, this bill of particulars became a part of the declaration, and there being no special count, the Plaintiff was confined to those particulars on the proof.

Evans' Md. Prac., 1st Ed., 212, 2d Ed., 259.
Desobry vs Delaistre, 2 Harr. & Johns., 223.

The Defendant (below) pleaded the general issue and set-off, (p. 5,) of which latter plea it is sufficient to say here, that it was demurred to, (p. 8,) and that both the Courts below held, on the first trial, that it was not pleadable against the State. (Rec. 26.) On the second trial, the question was of course not raised, and the decision in regard to it forms no part of the judgment now brought up for review.

At the first trial, the Plaintiff (below) gave in evidence (p. 9,) sundry Statutes of Maryland, containing the charter of the Baltimore and Ohio Railroad Company, and relating to the construction of a Branch Railroad between the cities of Washington and Baltimore, and to the payment by the Road to the State of one-fifth part of the whole amount received by the Company for the transportation of passengers on the said Branch Road, &c.

The Statutes referred to, and in reference to which the Constitutional question was mooted below, are merely enumerated in the first prayer of the Plaintiff in Error, (pp. 14, 32,) and it may facilitate the Court in understanding the relation which they bear to the controversy, to present chronologically, and in a narrative form, the time, substance and purposes of the various enactments.

The Baltimore and Ohio Railroad Company was incorporated by the Act of 1826, ch. 23, bearing date February 28th, 1827, (p. 15 of Laws and Ordinances relating to B. & O. R. R. Co.) By sec. 14 of that Act, (p. 21, Laws and Ord.,) it was empowered to make "lateral Railroads in any direction whatsoever" in connection with its main Road from Baltimore to the Ohio, and with the same power

for the construction and repair of the lateral as of the main Roads. By sec. 23, however, the State reserved (Laws and Ord., p. 26,) to its citizens and Companies subsequently incorporated, the right to connect with the Baltimore and Ohio Railroad, "any other Railroad leading from the main route to any part or parts of the State." By sec. 18, (Laws and Ord., p. 24,) the Baltimore and Ohio Railroad Co. was prohibited from charging more than three cents a mile for any single passenger, or more than the same sum per ton of merchandise.

In the winter of 1830, the Baltimore and Ohio R. R. Co. applied to the Legislature for its concurrence in a plan proposed by the Company for the construction of a Railroad from Baltimore to Washington. The Act of 1830, ch. 158, bearing date February 22d, 1831, was accordingly passed, (Laws and Ord., p. 35,) and the Court will see by its terms what the plan proposed to and accepted by the State was. The preamble recites that until the end of one year (sect. 2 makes it two years) after the Railway communication between the two cities should be effected and in operation, *the Railway Company proposed* that the State should have the option either to subscribe for and take stock of the Baltimore and Ohio R. R Co. to the amount of the whole or any part of the funds to be expended by the Company in the construction of the Road, or to take and hold any part of said amount not exceeding five-eighths of the whole cost of construction and contingent expenses in a separate and distinct stock, whereby this important national work should be "effected without any advance of funds or risk of responsibility by the State, while the right and option will be secured to the State to derive a full portion of its benefits." The preamble further shows that the General Assembly deemed it "beneficial to the State and its citizens to authorize," and accordingly did authorize "the extension and construction of said Road on the terms proposed by said Company." (Laws and Ord., p. 36.) By the 2nd section of the Act, (Ib. p. 37,) the option recited as above by the preamble was secured to the State, she to pay for the Company's stock, or the special stock, (which ever she might elect to take) in money or in her own stock, bearing four-and a-half per cent. interest. By the 3rd

section, the Company was allowed to increase its fare for passengers and its charge for transportation, beyond the rates allowed, as above, by its original charter; its rates per passenger, especially, being extended to twelve-and-a-half cents for the shortest distance, four cents a mile for any part of the distance exceeding three miles, and one dollar and fifty cents for the whole distance. By the 4th section, the Corporations owning the Washington Turnpike were authorized to subscribe to and become interested in the new Railroad—their dividends to be employed in keeping up the turnpike. (Ib. p. 39.) By the 5th section, the right of taxation was reserved to the State, and the 7th section made the Act void, unless the Road should be commenced in one and finished in three years. (Ib. p. 40.)

This Act proving ineffectual, another was passed on the 14th of March, 1832, (being the Act of 1831, ch. 30,) which will be found on p 43, of the volume of Laws and Ordinances already referred to. The preamble recites that the Baltimore and Ohio R. R. Co. have caused reconnoissances and preliminary surveys and estimates to be made with a view to the construction and location of the proposed Road, and have reported the result, &c., to the General Assembly, and "have prayed the aid of the Legislature, that they may be enabled to obtain the funds for the construction of the said Railroad." It further recites that the citizens of various counties "have prayed for the grant of Legislative aid to construct the said Railroad." (Id. 44.) It then (sec. 1,) authorizes the Baltimore and Ohio R. R. to open books for subscriptions; (sec. 2,) empowers the Corporation of Baltimore to subscribe for five thousand shares of stock, (the par being one hundred dollars.) The State's option, as provided by the Act of 1830, ch. 158, sec. 2, is still reserved by the 3d and 9th sections. By its 8th section the Railroad Company is allowed one year for the commencement of actual construction, and three years longer to complete its whole Road, with at least one set of tracks to the line of the District—failing which the Legislature reserves to itself the right to incorporate another Company for the work, or authorize any other persons to lay out and make a Railroad over any ground and in any direction between Baltimore and

the District line. Power to borrow necessary moneys and secure them by mortgage is given to the Railroad Company by sec. 4.

This project failed like the previous one. The Company could not itself build the Road as the first Act contemplated. The Turnpike Corporations not only never subscribed, but afterwards sued for damages for loss of travel, &c.

See 10 Gill & Johnson, 392, Wash. Turnpike *vs.* B. & O. R. R.

The last Act brought no subscribers, and the Railroad Company not being able to borrow the necessary funds, came again to the Legislature for relief, which was liberally accorded by the Act of 1832, ch. 175, passed March 9th, 1833. (Acts and Ordinances, p. 49.) The preamble to this Act recites that "there is a difficulty in procuring the funds necessary to the construction of a Railroad from Baltimore to the City of Washington, under the original Act, &c.," "arising from the option reserved to the State of Maryland," in the two previous Acts, which "deters individuals and Corporations from embarking their funds in the undertaking." This "option," it will be remembered, *was offered and held out by the Company to the State* as the great consideration and inducement for her entering into the project, and was, as the preamble to the Act of 1830, chap. 158, expresses it, the means "whereby this important national work will be effected without any advance of funds or risk of responsibility by the State, while the right and option will be secured to the State to derive a full portion of its benefits."

By virtue of this option the State was entitled, if she saw fit, at any time within two years after the whole road should be completed and in actual use, and after the Company had taken all the risks, to subscribe to stock of the Baltimore and Ohio Railroad, to the amount of the whole, or any part she might designate, of the entire cost of construction, paying for it in money, or in her own stock, bearing only four-and-a-half per cent. interest, payable in such way as the Legislature might provide. If she preferred, she could take five-eighths of the whole cost, in the shape of separate

stock, payable in the same way, and thus become owner of five-eighths of the whole Branch Road, issuing her own four-and-half per cent. stock therefor.

The period within which she had to determine whether she would do either of these things was long enough to enable her to know, with absolute certainty, whether the road would be a success, and whether she would make or lose by them. We well know now, what it would have been worth to her to own five-eighths of the road, and at the same time be freed from the constitional scruples of the Company. Nevertheless, by the Act of 1832, ch. 175, the State not only surrendered her option as she was memorialized to do, but engaged to "advance funds" besides. By the 4th and 15th sections she relinquished the option. (Laws and Ords., pp. 50, 54.) By the 1st, (Id. p. 49,) she agreed to subscribe for half a million of stock, so soon as other subscriptions should be made, to the amount of a million. By the 5th, (Id. p. 51,) she authorized the Company itself to subscribe and borrow money therefore on mortgage and hypothecation. By the 6th, she required the subscription of the City of Baltimore to be made, if it all, within six months. By the 7th section, (Id. p. 52,) she authorized the Company to charge two dollars and fifty cents for every passenger between the two cities, and in proportion for shorter distances—being at the rate of six-and-a-quarter cents per mile—more than double the amount allowed by the original Charter of the Company, and largely in excess of the rates allowed by the Act of 1830. By the 8th section, it was provided that the said maximum charge should not at any time be reduced without the consent of the Legislature, or of the Executive during a recess, and that even with such consent, it should never be carried to a lower figure than one dollar and fifty cents. By the 2nd section, the whole stock to be subscribed by the State, city and individuals, was made a separate stock, distinct from the general stock of the Baltimore and Ohio Railroad. The 12th section extended for still another year, from the passage of the Act, the time for the commencement of the actual construction of the Road and required it to be completed with a single track within three years from its

commencement, and a double track within five years. This latter requirement, as to the double track, was afterwards withdrawn in favor of the Company by the Act of 1837, ch. 337, (Laws and Ordinances, p. 100.) *The benefit which the State reserved to herself by the Act under analysis, as a consideration for the release of her "option," the subscription of half a million, and all the franchises, privileges and advantages which the Act conferred on the Company, is secured by the 8th section, the constitutionality of which rs the subject of present impeachment.*

That section is as follows:

And be it enacted, That the Baltimore and Ohio Railroad Company, shall pay to the Treasurer of the Western Shore of Maryland, on the first Monday in January and July in each and every year, for the use of the State, one-fifth of the whole amount which may be received for the transportation of passengers on said Railroad by said Company during the six months last preceding; and it shall be the duty of the President or chief officer of the Baltimore and Ohio Railroad Company, to exhibit, on oath or affirmation, to the General Assembly, on the first day of January or as soon thereafter as the said Assembly shall convene, in each and every year, an account, showing the gross amount received by said Company for the transportation of passengers on said Road, and the State's proportion thereof; provided, that the charge for conveying each person the whole distance between the cities of Baltimore and Washington shall not be reduced below the maximum of two dollars and a half, hereinbefore established, unless by the consent of the General Assembly, or in the recess of that body, by the consent of the Governor and Counsel, which consent shall be effective until the end of the session of the General Assembly, next ensuing; and provided, also, that in no case shall the amount received by the State from the Baltimore and Ohio Railroad Company for the conveyance of each person the whole distance between the two cities, be less than twenty-five cents; and provided, that at any time and at all times, whenever an application is made to the Legislature by said Company, to reduce said maximum price, it shall be lawful for the Legislature to make such regulation of

charge as it may deem necessary, not reducing the transportation of passengers to the Company below one dollar and fifty cents for for the whole distance, and rateably for any shorter distance.

The one-fifth of passengers fares thus to be paid to the State, together with the premiums which may be derived from the sale of the State's four-and-a-half per cent. stock, authorized under the first section, to be issued for the purpose of the State's subscription of half a million, and all the dividends accruing on the State's stock in the Washington Branch Road, together with any interest thereon, were by the ninth section (Laws and Ordinances, 52, 53,) directed to be invested by the State Treasurer as a sinking fund for the payment of interest on the State bonds aforementioned and the final redemption of the same as they may fall due.

By the Act of 1833, ch. 33, (Laws and Ordinances, p. 62,) the State agreed to substitute five per cent. stock for the four-and-a-half per cent. stock just referred to.

The Act of 1834, ch. 299, (Ibid. 68,) repeals the 9th section of the Act of 1832, ch. 175, so far as it provides for the sinking fund above mentioned, but still requires (sections 1 and 4,) that *all the revenues of every sort, received into the Treasury from the Baltimore and Washington Railroad, shall be applied to paying, first, the interest, and finally, the principal, of the State's subscription to that enterprise.*

By the Act of 1844, ch. 102, the Baltimore and Ohio R. R. Co. is authorized (Laws and Ordinances, p. 118,) to reduce the rate of tolls for passengers, from time to time, in its discretion, so however as that the charge between the two cities shall at no time be less, for a single passenger, that one dollar and fifty cents, and that one-fifth of all such passage moneys shall be accounted for and paid into the State Treasury as heretofore. The same law also authorizes round-trip tickets at reduced rates, in the discretion of the Company, and allows a proportionate reduction in the fare of way-passengers.

The Act of 1845, ch. 370, allows a reduction of fare also, in the discretion of the Company, in the case of passengers passing from either of the two cities, or a point beyond either to the other city

or a point beyond it—thus covering the case of passengers over a distance who pass over the road as part of a longer route.

The Act of 1852, ch. 328, finally disposes of the whole matter, by withdrawing all limitations whatever upon the authority of the Company to reduce the passenger tolls. It is in these words:

"*Be it enacted by the General Assembly of Maryland*, That the Baltimore and Ohio Railroad Company shall be authorized to regulate the tolls to be paid for the transportation of passengers on the Washington Branch of the said road, in their discretion, not exceeding the maximum heretofore fixed by law; provided, that one-fifth of the passage money received from the said Branch Road be accounted for and paid into the State Treasury, as now required by law."

After giving these Acts of Assembly in evidence, the State further proved (Rec. pp. 9, 31,) that the Baltimore and Ohio R. R. Co. had accepted them all and that the Washington Branch was completed, accepted, and put into full operation in 1835, under the legislation in question. Also (Rec. pp. 14, 32,) that the President of the Company down to January, 1868, [that is for thirty-three years,] from the time of the completion of the Branch Road, had annually rendered the account of moneys received from passenger travel, which is required by the said Statutes, and that the Company in good faith, down to July, 1868, had semi-annually, for the same long period, made large payments to the State Treasurer, on account of the same.

It was further shown (pp. 14, 33,) that the fare charged during the period covered by the bill of particulars was one dollar and fifty cents per passenger between Baltimore and Washington, and at the same rate for shorter distances, and that at the time of the second trial, (p. 32,) there was due to the State $351,291.18, as of January 1st, 1870, if her claim was well founded in law.

No evidence of sufficient importance to be embraced in the bill of exceptions was adduced by the Company on the first trial, (p. 14,) and none at all on the second, (p. 32,) but, on the closing of the State's case, the counsel of the Company contented themselves with

"*First.* That the Act of Assembly of 1832, ch. 175, and the Acts of Assembly of 1836, ch. 261; 1844, ch. 103; 1845, ch. 370, and 1852, ch. 328, which have been offered in evidence, so far as they provide that the Defendant shall pay to the Treasurer of the Western Shore of Maryland, on the first Monday of January and July, in each and every year, for the use of the State, one-fifth of the whole amount that may be received for the transportation of passengers on the Branch Road mentioned in said Acts, during the six months last preceding, are unconstitutional, because in conflict with the Constitution of the United States.

"*Second.* That the fact that the said Defendants have charged and received one dollar and fifty cents for the transportation of passengers for the whole distance, over the branch road aforesaid, and the fact that the Defendants, up to the 30th day of June, 1868, have accounted with and paid to the Treasurer one-fifth of the gross receipts from passengers on said road, do not estop the said Defendants from denying the constitutionality of said Acts, and that the Plaintiff is not entitled to recover."

The first of these prayers, it will be observed, (Rec. pp. 14, 32,) placed the defence entirely upon a general allegation of the unconstitutionality of the Statutes in dispute, in the particulars stated. The second announced only an obvious principle of law, and would have been unobjectionable in itself, if it had not coupled therewith an instruction that the Plaintiff was not entitled to recover.

The State then asked instructions in the following terms: (pp. 14, 32.)

"1. The Plaintiff prays the Court to instruct the jury, that even if the Act of Assembly of 1832, ch. 175, as modified by the subsequent Acts of Assembly offered in evidence, is held to impose a tax on passengers travelling on the Washington Branch Road, and to be therefore unconstitutional under the Constitution of the United States, still the Plaintiff is entitled to recover, under its count for money had and received, as explained by the bill of particulars, one-fifth of the gross amount which the jury shall find to have been received by the Defendant for the transportation of passengers upon

+ See vide Bigelow on Estoppel 582 & cases there cited.

the Washington Branch Road, and not already paid over by the Defendant to the Plaintiff.

"2. The Plaintiff prays the Court further to instruct the jury, that if they shall find from the evidence that the Defendant accepted the terms of the several Acts of Assembly read in evidence, relating to the rate of fare for the transportation of passengers on its road between the cities of Baltimore and Washington, and relating to the payment to the State of one-fifth of the said fare, and that the Defendant, between the 31st day of December, 1859, and the 31st day of December, 1869, received for the said transportation any sum of money, then the Plaintiff is entitled to recover in this action one-fifth of the sum which the jury may so find to have been received and which has not already been paid to the Plaintiff, without regard to any question of conflict between the said Acts, or any of them, and the Constitution of the United States."

The original and only contention of the State thereby was, as throughout it has always been, that the question of the constitutionality of the State legislation was really not involved in the case; that if it was unconstitutional, as imposing a capitation tax on passengers, the Company had still collected and received large sums of money, for the State's use, which it had in its hands at the time of suit, and was bound *ex æquo et bono* to pay over; and that after it had so collected these moneys for the State, it had no right, in law or morals, to appropriate them to its own use, and set up this unconstitutionality as a defence against the State's claim.

To meet this view, the counsel for the Company, at the first trial (p. 15,) presented a third prayer, (after the argument on those already mentioned had been heard,) to the effect, that if the Railroad Company, before July 1st, 1868, and ever after, had denied the right of the State to the one-fifth of the gross receipts from passenger travel, on the ground of the unconstitutionality of the Acts in question, and from the 1st of July, 1868, to the 31st of December, 1869, had received the money in dispute, as due to itself under its Charter, there was no implied contract to pay the money

to the State, the Company, on that hypothesis, having received the same in its own right, and not as agent of the State.

But this prayer was objected to, among other reasons, because there was and *was admitted to be* (see p. 16,) no evidence in the cause, to support the hypothesis of fact on which it rested. It was consequently withdrawn by the counsel who presented it and was not passed on by the Court, (p. 16.) At the second trial, it was not renewed (pp. 32, 34,) and it is now only referred to, for the purpose of showing, that the liability of the Company on the *assumpsit* implied from the receipt of the money, and apart from the constitutional question, is demonstrated by the record to have been mooted, on the part of the Company as well as of the State, from the beginning. The total and confessed absence of evidence on the part of the Company to support the prayer which was thus abandoned, demonstrates, further, that the Company made no pretence of proving that the privity between it and the State had been interrupted in any way, or that it had even affected to insist on its constitutional difficulties, until it had first collected the money from the passengers, (who alone were within the constitutional protection,) and had it in hand.

The Judge of the Superior Court, on the first trial, granted the prayers of the Company and rejected those of the State, (p. 16,) thereby deciding:

1st. That the Statutes impeached were unconstitutional and void, and

2nd. That by reason of their unconstitutionality, the State could not recover, in an action of money had and received, the moneys collected under them, for the State, by the Company.

Judgment of course went for the Company.

Exceptions were taken (p. 16) and the case was carried by the State to the Court of Appeals, which reversed the judgment on May 30, 1871, and remanded the cause for a new trial, (p. 30.) At the second hearing, below, in February, 1872, the same facts were proven and the same ground was gone over, except that the Company presented only its first two prayers and not the third, as has already been stated. The two prayers of the State were

precisely the same as before, (pp. 31 to 33.) The Superior Court of course reversed its previous action and granted the State's prayers, refusing those of the Company. Judgment went for the State accordingly, which in June, 1872, was affirmed (p. 35) on appeal, and it is this last judgment of the Court of Appeals which is sought to be reviewed here.

POINTS.

I.

The Statutes of the State of Maryland, enumerated in the First Prayer of the Plaintiff in Error, and hereinbefore specifically referred to, are not in conflict with the Constitution of the United States.

Since the passage of the Act of 1852, ch. 328, the last Act mentioned in the prayer, the only legislative restraint which has existed upon the absolute control of the rate of its passenger fare by the R. R. Company, has been (as it now is) the fixed maximum which it shall not exceed. Its power to reduce the fare to the lowest figure has been, and is absolute, and the only right or benefit secured to or enjoyed by the State, so far as the fare is concerned, is, that semi-annually the Company shall return to the State an account of the whole amount received during the past six months, for the transportation of passengers, or passage money, and pay one-fifth of that amount to the State. This has been the state of the legislation during the whole period covered by this suit.

The constitutional rights which this legislation of Maryland is said to violate, are those which were announced and maintained by this Court, in the case of Crandall *vs.* Nevada, 6 Wall. 35. It was there held that the United States had the right to require the services of its citizens at the seat of government, and at all the points in the States where the functions of government were to be performed; that citizens had the correlative right to approach the great departments of the government, the ports of entry and the various Federal offices in the States; and that the Statute of Nevada, which enacted that there should "be levied and collected a capitation tax of one dollar, upon every person leaving the State

by any railroad, stage coach, or other vehicle engaged in the business of transporting passengers for hire," was an invasion of these rights and therefore unconstitutional. The majority of this Court placed its decision on the ground, that the Statute of Nevada taxed every traveller for the privilege of leaving the State by the ordinary modes of transit, and that as the right to tax involved the right practically to prohibit, the law was an obstruction and might be made a prohibition, of the rights of the government and the citizen above set-forth.

The Nevada law imposed, in terms, a capitation tax of one dollar upon every individual, who left the State by a public conveyance. It was therefore a specific tax upon the traveller, to be paid by and levied on him for the exercise of his right to leave the State, by the ordinary public conveyances, and over and above the entire fare for his travel. It is respectfully submitted, that there is no analogy between such a case and the case at bar.

The Maryland legislation, by its terms, instead of imposing a tax on the traveller, provides only, that the Company shall semi-annually pay to the State one-fifth of the amount received for "*the transportation of passengers*" *or* "*passage money.*" It does not authorize the Company to collect a tax from any person, for any privilege, but requires it to pay to the State, every six months, a tax of one-fifth of the amount received by it for its services in carrying passengers. The "passage money" received belongs to the Company, to be used and expended as it pleases. After the expiration of each period of six months, and only then, the amount of the tax is to be ascertained and the State becomes entitled to demand and receive that amount. This is simply a tax on its gross receipts from passenger fare, and the amount of the tax is to be ascertained, every six months, by the amount of its business during that period in passenger transportation. In reference to the justice and propriety of such a mode of ascertaining the amount of the tax, we quote the following language from the opinion of this Court, in the case of the "Society for Savings *vs.* Coite," 6 Wallace, 608: "Different modes of taxation are adopted in different States, and even in the same States at different periods of their

history. Fixed sums are in some instances required to be annually paid into the Treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the Corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.

"Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens, than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the Legislature, whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." There is clearly then nothing in the mode, by which the amount of the tax is ascertained, which takes away its character of a tax on the Company, and converts it into a capitation tax on the traveller, such as was imposed by the Nevada Statute.

It is worthy of observation too, that the tax is imposed by the Maryland Statutes, only on the amount actually received for carrying passengers, leaving the Company at liberty to issue free tickets, or transport persons without charge, or at reduced rates, on occasions where its interest, or inclination, or duty may so dictate. What in such cases becomes of the capitation tax on the traveller, for leaving the State? If such a tax was meant, this power would not have been left with the Company.

Again, the Nevada law prohibited the citizen from travelling, at the usual and agreed rates of fare, over existing and established routes, and in existing and established conveyances. It impaired and obstructed his existing rights. The Maryland Statutes were passed in order to create new and improved modes of conveyance, where only antiquated and uncomfortable transportation before existed; to give to the traveller a railroad instead of a turnpike; to provide him with the means of enjoying his constitutional right of locomotion, instead of obstructing it. The tax or *bonus* reserved by the State was, so far as concerned the traveller, only a mode of re-

imbursing her for outlays made for his benefit; for the State imposed on the Company no obligation to overcharge the traveller, but only to pay to her, for value received, an amount to be ascertained semi-annually by the amount of its passenger business. If precisely the same reservation had been made in favor of any private person or other corporation, except the State, it would have been lawfully and fairly payable, beyond dispute, and no man would ever have dreamed of disputing it. The arrangement was a condition precedent to the building of the Railroad, which, without such an arrangement, would never have been built.

So far, too, as the Plaintiff in Error is concerned, this case differs from the Nevada case as widely as in reference to the passenger. The laws here in question were a contract made with the Company by the State, at the urgent entreaty of the Company and for its aid and benefit. They constituted a contract, not merely because Acts of incorporation are from their nature contracts, but because they were supported by good and valuable consideration; because they were eminently fair and just; because the Company not only solicited but joyfully accepted them, and built and finished, and has enjoyed the vast profits of its Road under them and by means of them. The right to one-fifth of the amount of the gross receipts from passenger fare was given to the State as a *bonus* for the franchise and as the price of a valuable privilege and option which it parted with, upon that consideration, and on the Company's urgency, and which the State might have refused, on any terms, if it had seen fit, Though now called a "capitation tax," it was reserved as the foundation of a proper sinking fund, to provide re-imbursement to the State for the public moneys expended, upon the Company's solicitation, and for its benefit. No contract between individuals was ever more entirely surrounded by all the considerations which create legal validity, and are commonly held to impose moral obligation. To liken it to a case where an existing Railroad Company is sought to be forced by a law, for the State's benefit, without any consideration paid, to act as a mere collector of a capitation tax of a dollar on each of its passengers, apart from and in addition to their fare, seems to be taking liberties with analogical reasoning.

It is clear, that if the State had exacted from the Company, as a *bonus* or price for the franchise which it granted and the privileges which it relinquished, a large sum of money, payable in cash, or by instalments, or at some distant day with interest payable semi-annually which might have borne heavily on the Company, and indirectly on the traveller, it would have been but the exercise, on the part of the State, of a recognized constitutional power. *Gordon vs. Appeal Tax Court*, 3 *Howard*, 145. It is difficult to understand how the *bonus* becomes unconstitutional, because its amount is to be ascertained semi-annually, according to the gross receipts from the transportation of passengers. Like the *bonus* just supposed, it is exacted from the Company—to be paid by it, out of its receipts—and cannot be increased by the State to the point of prohibition, because its amount is proportionally fixed by a contract which the constitution protects. Surely the mere fact, that this amount is measured by the semi-annual receipts from passenger travel, cannot convert it into a capitation tax on passengers; and except in that fact, it does not differ from the *bonus* supposed.

Besides, in the Nevada case there was a *specific* tax directly imposed upon every person leaving the State by the ordinary public conveyances, and in the opinion of the Court in that case, it was intimated that the compulsory payment of "a specific sum to the State," by every traveller passing through it, by the usual modes of public conveyance, would be regarded as a tax upon the exercise of the right of transit. The Maryland Legislation now in question, does not in terms impose any, and certainly not a *specific* tax on the traveller. Under it the Company fixes its own fares, at its own rates, being only restrained by a fixed maximum; and it can collect of the passenger nothing but the fare for his transportation.

But, it is contended that under the decision in the Nevada case, (6 Wallace, 40,) and the language used by Chief Justice Taney in the passenger cases, (7 Howard, 283,) as the burden of the exaction may fall, here, on the passenger, it is practically a tax on him, and therefore a restraint on his constitutional rights. *Non sequitur.* The usual fare exacted by any railroad company which pays any tax to the State, would, if this were true, be unconstitutional.

It may no doubt be reasonably assumed—that in the absence of this tax a somewhat lower rate of fare would be established by the Company, though this is far from certain. But if the fare be higher, because of this tax, the same result would follow from any tax directly on the capital or property of the Company. Its taxes form a part of its annual expenses, and are of course considered by it in fixing its rates of charge; and these rates will naturally be increased by any and all taxes imposed upon it, no matter how remote they may be, in their nature, from a tax on travellers. The probable or necessary increase of the rate of fare, because of a tax, does not then demonstrate or even indicate, that the tax is a tax imposed on the passenger. To hold otherwise, would be to carry the principle of the Nevada case to an extent, which would exempt Railroad Companies entirely from State taxation.

If that which is collected by the company is charged and collected by it, and paid by the traveller as fare—if it is within the maximum rate allowed, and rightfully and constitutionally allowed by the charter, and is liable to be reduced, in the discretion of the company, as competition or other causes may dictate, it is fare and only fare. Yet it is said, that because the company has, by contract with the State, founded on most valuable considerations, agreed to pay to it every six months, a fifth of the whole amount it may have received during that period *from the transportation of passengers*, the amount of this one-fifth ceases to be fare or a part of the fare, and is converted into a capitation tax on the passenger. Undoubtedly, the Company may, for valuable consideration, validly bind itself to pay any portion of its gross receipts to individuals or a corporation, and it is not perceived why it may not so contract with the State. If an agreement to pay a landholder semi-annually a given portion of its whole receipts from passenger fare, for the occupation of his land, does not to that extent convert the fare into rent, paid by the passenger for the right to pass over the land, why should the agreement to pay the State such given portion, convert the fare into a tax on the passenger, for the privilege of passing through the State? Certainly, if for any reason, the State should not choose to demand its one-fifth, or should abandon all claim to it, the whole amount

collected by the company would belong to it as passenger fare, and, except at the absolute pleasure of the Company, the burden of the traveller would not be lightened a single farthing; whereas, a similar abandonment of its tax, by the State of Nevada, would *ipso facto*, and of necessity, have relieved the traveller, to the full amount abandoned. Indeed, in this very case, while the company alleges the unconstitutionality of the exaction, because it is a tax on passengers, it claims to retain the money on the ground that it "was received under authority of portions of the Maryland Statutes, which were valid and operative, and under the authority of a valid act of Congress." This means, and can only mean, that it was received as passenger fare.

It is not, and will not be questioned, that the Maryland Statutes were honestly passed by the Legislature, with no intent to evade any constitutional obligation, for, at the time of their passage, the constitutional rights, which the Company, in this case, seeks vicariously to protect, were undeveloped. They had not been announced in this Court or elsewhere, and it is believed attention had not then been drawn to their existence. If the Legislature had desired to impose a capitation tax on travellers, it could have done so, not only openly and fearlessly, but generally; and the fact that the tax was exacted from this Company alone, and as a *bonus* reserved by its charter only, for a valuable franchise granted, shows that no such desire or intention existed. If then the Legislation be honest, and by its terms imposes the tax on the Company, and gives it no right to collect any thing from the passenger but the fare for his transportation, is it right, or possible, that by *construction*, the tax shall be held to be a direct and specific tax on the traveller, because after the fare is collected, at the end of each period of six months, the Company is to report to the State the gross amount received for the transportation of passengers, and pay to it a tax of one fifth of that amount? Can the Company, in order to increase its dividends, voluntarily impose its own just burdens on the traveller, and thereby make them unconstitutional and escape them? Can it be allowed to raise up such a defence out of its own wrong?

The questions, of the construction of the Maryland Statutes and of their constitutionality, are very ably examined in the opinion of the Court of Appeals, delivered by Bartol, C. J., and the dissenting opinion by Alvey, J., to be found on pp. 18 and 27, printed Record. As these opinions are thus before this Court, we abstain from reproducing here much that is said in them, and respectfully request leave to rely upon them as if they had been incorporated in this brief.

It is therefore contended for the Defendant in Error, as resulting from the preceding examination of the Maryland Statutes, that the *bonus* reserved by them, which if a tax at all, is only such in the most general and not in the strict sense of that term, is a tax on the franchise granted, to be measured and graduated semi-annually by the gross receipts for passenger transportation, and to be paid by the Company out of its own money. This is apparent, as well from the express language of the Statutes, as because the Company was authorized to collect nothing from the traveller except the passenger fare, and that fare as collected belonged exclusively to it, to be used and expended in its discretion; the State having no claim to it, and only being entitled at the end of each six months, when the gross amount received during that period has been ascertained, to demand of the Company this tax of one-fifth of that amount.

The constitutionality of such a tax is, we respectfully submit, directly established by this Court in the case of "State tax *vs.* Railway Gross Receipts," 15 Wallace, 284. There, a tax of three-fourths of one per centum on its gross receipts, was imposed by a Statute of Pennsylvania, on every railroad, canal and transportation company, incorporated under the laws of Pennsylvania, and not liable to the tax upon income under the existing laws; and semi-annual returns of the amount of gross receipts were required to be made, for the purpose of ascertaining the amount of the tax, and this Court held it to be a constitutional exercise of the State's power of taxation. This tax differs from the Maryland tax now under consideration only in its smaller rate of taxation, and in its imposition on the whole gross receipts, instead of the gross receipts from one branch of business, and these differences do not affect the

principles on which it was decided. We insert here, as the best argument we can present, portions of the opinion of this Court in that case, which seem to us directly applicable to the case at bar.

"We think it may be safely asserted that the States have authority to tax the estate, real and personal, of all their corporators, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of affecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution."

Upon the question whether a tax on gross receipts is a tax upon freight transported, or upon the owner of freight, for the right of thus transporting it, this Court say, "certainly it is not directly. Very manifestly it is a tax on the Railroad Company, measured in amount by the extent of its business, or to the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted," &c.

"The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received from freights and other sources of income, has actually come into the Company's hands. Then it has lost its distinctive character of freight carried, by having become incorporated into the general mass of the Company's property."

In speaking of the line within which State taxation is constitutional, the Court uses the following language: "This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down, that the gross receipts of Railroad and Canal Companies, after they reach the treasury of the carriers, though they may have been derived in

part from transportation of freight between States, have become subject to legitimate taxation."

We make one other extract, as follows. "It is not to be questioned that the States may tax the franchise of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be in fact laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of franchise. In both cases, the necessity of higher charges to meet the exaction is the same."

Our apology for these copious extracts from an opinion so recently delivered, and no doubt fresh in the recollection of the Court, is to be found in our belief that their reasoning is as strong as their authority, and that when applied to our Maryland legislation, they are conclusive, in favor of its constitutionality.

The principles on which this decision rests have been re-affirmed by this Court, in the case of "Osborne *vs.* Mobile," 16 Wall., 482, and the case of "Erie Railroad Company *vs.* The Commonwealth of Pennsylvania," decided at the present term, and they are now to be taken as the settled law. Consistently with these principles, it seems impossible, that the Maryland Legislation, which reserves a *bonus* to be paid by the Company to the State for a franchise granted, and makes its amount ascertainable every six months by the amount of the gross earnings of the Company during that period, from passenger transportation—gross earnings which no doubt will have been at the time of such ascertainment, expended or mingled by the Company with its general property—can be held to impose a tax upon the traveller. In the Nevada case a capitation tax was *expressly* imposed on the traveller leaving the State: in the "case of the State Frieght Tax," 15 Wall., 273, the tax was "*expressly* laid upon the freight carried," but in the case at bar, it is sought to make out a *constructive* violation of implied constitutional rights.—

It is respectfully submitted that the authority of these cases goes to no such dangerous extent.

In the separate argument filed in this case by Mr. Gwinn, for the Plaintiff in Error, under the head of the Federal questions raised by the first prayer of the Plaintiff in Error, reference is made to the Act of Congress of March 2nd, 1831, under which the Washington Branch Road was extended into the District of Columbia, and it is contended that the Statutes of Maryland were *inoperative*, in so far as they applied to revenue derived from transportation in the District of Columbia. Even if this were so, it is not perceived how it supports a prayer which asks the Court to say that the Statutes which it enumerates were *unconstitutional*.

No such point is really raised, or was intended to be raised by the prayer. No evidence was offered applicable to it—no proof as to what part of the fares was collected in or from the District—none to show that any were collected in excess of those allowed by the Act of Congress.

But without further discussion, we respectfully submit, that it was just as competent for the Maryland Corporation, extending its Branch Road into the District, under the Act of Congress of March 1831, to agree with the State of Maryland, to pay a *bonus* to be measured by its whole gross receipts from passenger fare, as it would have been, if the road had not been extended beyond the limits of the State. The State, on the other hand, having the absolute right altogether to refuse the concessions which the *bonus* purchased, had an equal right to exact a share of the entire passage money over the whole line, as a consideration for making them.

II.

If we are right in the views which we have submitted, as to the constitutionality of the Maryland Statutes, then, under the opinions of this Court, pronounced at this term, on the motion to dismiss in this cause, and in the case of "Murdock *vs.* Mayor of Memphis," the judgment of the Court of Appeals of Maryland will be affirmed without examination of other questions. But if this Court should hold the Maryland legislation to be unconstitutional, then the inquiry will

arise, "whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision on such other matter or issue." "*Murdock vs. Mayor of Memphis*," opinion by Mr. Justice MILLER.

Upon this alternative view of the case it is here contended for the Defendant in Error, that even if the Statutes in question are held to be unconstitutional, the case presents another matter adjudged by the Court of Appeals of Maryland, sufficient and broad enough to maintain its judgment. This is found in its decision, that upon the case presented by the Record, the Defendant in Error was entitled to recover, even if the unconstitutionality of the Statutes was conceded.

This unconstitutionality is asserted, and we assume can only be maintained on the ground that the Statutes impose a tax on passengers for the privilege of passing through the State, and make the Company the collector of that tax for the use of the State. If this be so, then the Company collects from each passenger one-fifth of his fare as a tax for the State, and this is done under a Statute not operating on the Plaintiff in Error compulsorily and by virtue of legislative power alone, but also as a contract into which it voluntarily entered. The relation of the Company to the State upon this construction of the law, is clearly that of agent for the collection of the alleged tax.

By reference to the statements furnished from the books of the Company, set forth at length in the first bill of exceptions (pp. 10 to 13,) and condensed in the second, (pp. 31, 32,) it will be seen that the amounts claimed by and allowed and paid to the State on account are undisguisedly called by the Company the "State's one-fifth," wherever they appear. It is further shown by the bill of exceptions, (p. 32,) that down to July 1st, 1868, semi-annual payments were made by the Company on account—that during the whole period covered by the bill of particulars, (from 1860 to 1870,) the same fare was charged by the Company, viz: One dollar and fifty cents for each through passenger, and that it was expressly admitted

that if the claim of the State was well founded in law, there was due to it, according to the statements from the Company's books, $351,291.18, principal and interest, down to January 1st, 1870. No proof was offered that the relation of agency had in any way or at any time been terminated, or that there had been any severance, actual or attempted, of the privity between the parties, or that the amount withheld had not been received precisely in the same way as the amounts of the same fund admitted to have been due and already paid over.

The right of the State to recover this large sum of money from the Company was placed, from the inception of this suit, upon grounds independent of the question of the constitutionality of the Statutes. The declaration contained two counts only, one "for money due and payable by the Defendant to the Plaintiff," and the other "for money had and received by the Defendant for the use of the Plaintiff." Neither of the prayers offered by the Plaintiff in Error impeached, or indeed referred or pointed to the pleadings, so that, according to the established Maryland rule, they conceded the right to recover on those pleadings, if the evidence established a right to recover at all; but they set up and relied on the defence of the unconstitutionality of the Statutes. The State in reply, by its prayers, claimed the right to recover, even if the Statutes should be held to be unconstitutional, and without regard to the question of constitutionality.

The Railroad Company thereupon argued, that the Statutes imposed a tax on passengers and required the Company to collect it, which, under the ruling in Crandall *vs.* Nevada, (6 Wall., 35,) made them *quoad hoc* unconstitutional and void. The State of Maryland replied, that conceding the Statutes to be void for the reason assigned, the Company was liable, nevertheless, for what it had already collected, and what the passengers, whose rights only were affected, had already paid to it without dispute, and waiving their rights, as this Court has held they might do. (Philad. and W. R. R. *vs.* Trimble, 12 Wall., 382, 383.) These propositions of the State were founded too, on what for thirty years had been established law in its Courts. In 1843, in the case of Waters *vs.* State, (6 Gill, 308,) in a suit of

the State against a delinquent tax collector, the Court of Appeals had laid it down in the following unequivocal language: "It is admitted by the demurrer in this case that the collector has received all the taxes levied on the assessable property of Montgomery County, the non-payment of which furnishes the subject of this suit. Having thus admitted the receipt of the money, the collector, who is in the light of an agent of the State, could not be heard to urge in his defence to a suit that the money he had received was on account of taxes which the Legislature had no constitutional power to impose. The question of constitutional authority to levy the tax would properly arise between the collector and the person taxed, before payment, or, after payment, between the State and such person."

This ruling was pointedly affirmed in 1867, by the present Court of Appeals, in O'Neal *vs*. School Commissioners, (27 Md., 240,) and has never been brought into question in the State since the decision in 1st Gill. The doctrine which it applies and the propriety of such application have had the sanction of this Court in Bell *vs*. Railroad Co., (4 Wallace, 598, 602,) where a tax collector, with public funds in his hands, was denied the right to set up the illegality of a county subscription, as a defence to an action by the railroad in whose favor the subscription was made and for whose benefit the tax had been collected. Nor has it been approved with less emphasis in other cases, where the general principle has been before this Court for its consideration. We beg leave to refer to the report of the present case in 34 Md., 365 to 367, (Rec. pp. 21, 22,) where it will be seen that the principle asserted in Waters *vs*. The State, (1 Gill, *ub. supr*.,) and in the prayers of the Defendant in Error in this case was held to be supported, not merely by text writers of the highest authority, (see Paley on Agency, 28 Law Libr., 62,) but by the ablest English Judges, in decisions cited and adopted by this Court, in the leading cases of

McBlair *vs*. Gibbes, 17 Howard, 236, 237.
Brooks *vs*. Martin, 2 Wallace, 70, and
Planters' Bank *vs*. Union Bank, 16 Wallace, 500,
where the point distinctly arose.

Here then was a ground covering the whole case, and broad enough to maintain the judgment of the Court below, which was presented to that Court as a proper basis for its decision, and upon which its judgment was in fact founded. Beyond all doubt it was a just ground, for no principle of justice or morality would authorize the Company to put into its own coffers a tax which it admitted and alleged it had collected for the State, and which, certainly, did not become its own property, by reason of having been unconstitutionally levied. It seems equally clear that it was a ground fully sanctioned and established by the principles of the common law, and by the decisions of this Court and of the Court of Appeals of Maryland, cited above.

The high function exercised by this Court, in enforcing the observance of the Constitution is, it is respectfully submitted, fulfilled by striking down the unconstitutional provision of the State legislation. The question whether the State or the Company shall have the money collected under this legislation prior to the institution of this suit, and in reference to which the duty of the Company, as agent, had been performed in all respects, except in not having paid it over, is a question in which the constitutional interests committed to the charge of this Court, do not require it to intervene.

Whether an agent who has received money for his principal, or an official or special collector who has received money for the State, under a law repugnant to the Constitution, but to which he was a willing and interested party, should, on grounds of public policy, be permitted to set up his own wrong, or his participation in the wrong, as an excuse for appropriating the fund, is a question, it is respectfully submitted, which belongs to the State Courts, in cases properly before them. Congress has not seen fit to designate such questions (if it could) as a source of Federal jurisdiction. Even if this Court could go beyond the cases to which the Judiciary Acts have confined it, for the purpose of enforcing the observance of the Constitution in other ways than those Acts have prescribed, it would hardly consider such observance as likely to be promoted by offering a premium to repudiation on the part of public or private agents. To collect from passengers an unconstitutional State tax, and then retain it, from

both the State and the passengers, because the tax is unconstitutional, is to assert a claim not founded on the Constitution, or upon any legislation of Congress—not in any sense meritorious, but standing nakedly on the common law maxim, *in pari delicto potior est conditio defendentis.* To such a claim the cases already cited furnish an explicit and sufficient answer; but we beg leave to refer to some other decisions of this Court, for the double purpose of showing the estimation in which it holds a claim of this character, and of also showing that such a claim is not only, not so blended with the Federal question in a case like this, as to be incapable of separation from it, but is in truth not *blended* with it at all.

In the case of Walworth *vs.* Kneeland, (15 How., 353, 354,) the Plaintiff in Error defended himself below, on the ground that the contract sought to be specially enforced against him, and to which he was a party, was entered into by the Defendant in Error in fraud and violation of an Act of Congress, and was contrary to public policy and void. The Court below, although it held that the contract would have been void if proven as alleged, found against the Plaintiff in Error, on the facts. This Court refused to entertain jurisdiction, but Mr. Chief Justice TANEY, in delivering its opinion, said (p. 353,) "that even if the State Court had committed so gross an error as to decide that such a contract was valid and could be enforced, the writ of error could not still have been maintained." A party coming to this Court under the 25th section of the Judiciary Act, must shew, said the Chief Justice, that he claims "some interest which the law recognizes and protects, and which was denied to him in the State Court. *But this Act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of the law.* Such a contract, it is true, would not be enforced against him in a Court of Justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the Court. But to support this writ of error," continued the Court, "he must claim a right, which, if well founded, he would be able to assert in a Court of Justice upon its own merits and by its own strength. No such right is claimed in the answer of the Plaintiff in Error. And indeed it would be a

novelty in legislation and in public policy, if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States, and found themselves in the end the sufferers by the speculation; or who, by the error of a State Court, had been compelled to share its gains with their associates in the fraud. The right or interest claimed in the State Court must be of a very different character, to entitle him to the protection of the Act of 1789. It has already been so decided in this Court in the case of Udell *vs.* Davidson, 7 Howard, 769."

In the last named case the doctrine is announced in still more pointed language by the same learned Judge. The Plaintiff in Error, he says, (p. 771,) "admits that he participated in the fraud * * * and now contends that by means of this fraud upon the Government he has acquired, under this Act of Congress, a right to perpetrate a fraud on his *cestuis que trust.* This, in plain words, is the amount of his defence and this is the right or privilege which * * * he calls on this Court to recognize and maintain. We shall not come ment on such a claim The writ of error must be dismissed for want of jurisdiction." See also "Delmas *vs.* Insurance Company, 14 Wallace, 665, 666."

It is of course not to be suggested that the contract between the State and the Company, arising out of the Statutes impeached and their acceptance, was entered into fraudulently upon either side, or with any suspicion that it was forbidden by the Constitution. The Company, then young and needy, required and sought the assistance of the Legislature, and the latter, in granting what was asked, deemed it due to the people of the State to reserve an annual *bonus*, in compensation for the privileges granted and the interests surrendered. That *bonus*, the reservation of which is now the subject of contention, was cheerfully agreed to by the Company, and the Branch Road was built and grew rich under the operation of the statutory contract which secured it. If it was a tax on travellers (as is now contended,) even they have had some consideration for it, in the substitution of railway travel, such as now enjoyed, for the turnpike and mail stages of that day, now forty years gone. If, however, the Statutes should turn out to have been void from the beginning, and the Company is

now entitled to repudiate the contract for that reason, it is at least *in pari delicto* with the State, whatever be the blame. In claiming to withhold the moneys which it has confessedly received and should pay over under the contract, and which, even on its own theory, do not belong to it, the Company is asserting a defence which only considerations of public policy could induce a Court of Justice to tolerate. It is making no defence "on its own rights or merits." Its pretensions, therefore, stand precisely on the ground which this Court, in the cases last referred to, has placed beyond the pale of its jurisdiction and approval. Indeed the counsel for the State are not prepared to admit that the doctrine of *par delictum*, or *delictum* of any sort, can be applied, by the Courts, to any dealings of a State, with its citizens, natural or corporate. While it is the province and duty of this Court, to declare that State Statutes are unconstitutional, when it finds them to be so, judicial respect and comity, at the same time, forbid it to ascribe to State legislation or to the States, any purpose of violating the Federal Constitution. Nor can it be assumed or held, it is respectfully submitted, that the State itself has violated, or seeks to violate, by its own laws or conduct, its own public policy.

If we are right in the views already submitted on this point, it necessarily follows that the decision of the Federal question, presented by the Record, if adverse to the State of Maryland, is not sufficient "to control the judgment in the whole case." The question of the unconstitutionality of the Statutes is entirely distinct from the question of how far that unconstitutionality forms a valid defence for the Company against the money demand of the State. One is to be decided upon the true construction of the Constitution and the laws which are alleged to violate it, and the other depends for its solution on the application of common law principles. The latter is independent of, and is not reached by the decision of the constitutional question. If the Company claimed that the demand of the State, for payment of the amount of tax collected, was in conflict with any constitutional right of its own, which it asked this Court to protect, the decision of the constitutional question might cover and dispose of the whole controversy. But here the Company seeks to rely on the constitutional rights of others, and a decision,

maintaining such rights, manifestly does not involve or extend to the question of the right of the Company to appropriate to its own use moneys which it had collected for the use of the State. If the Company believed and was advised that under the Nevada case it had no constitutional right to collect the tax, and had refused to collect it accordingly, as was done by the carrier, in Nevada, its position would have been a different one. But to forget the constitutional prohibition, until it had collected the money, and only remember the Constitution as an excuse for retaining it, was a proceeding which public policy can hardly be regarded as deeply interested in countenancing.

A. K. SYESTER,
Att'y Gen'l of Md.,
I. N. STEELE,
P. F. THOMAS,
S. T. WALLIS,
For the Defendant in Error.

No. 21

BALTIMORE AND OHIO RAIL ROAD CO.

vs.

THE STATE OF MARYLAND.

Constitutionality of the Capitation Tax.

ARGUMENT OF

REVERDY JOHNSON,

On the Part of the Company, before the Supreme Court of the United States,

April 5th, 1875.

Murphy & Co., Printers & Stationers, 183 Baltimore street, Baltimore.

BALTIMORE AND OHIO RAIL ROAD CO.

vs.

THE STATE OF MARYLAND.

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ARGUMENT OF

REVERDY JOHNSON,

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April 5th, 1875.

MAY IT PLEASE YOUR HONORS!

There are three questions in this case, which I propose to consider. They are:

First. Are the acts of Maryland, securing to the State one-fifth of the receipts from passenger travel over the Washington Branch of the Baltimore and Ohio R. R. constitutional?

Second. If they are unconstitutional, can the judgment below be maintained?

Third. If it can be maintained, independent of the constitutional question, must not the Court decide that question? I will first consider the last question.

That the constitutional question was before the Court below is clear. First. Because the money which the State seeks to recover, was received by the Company under the alleged unconstitutional acts. The State gave those acts in evidence, and had

no other evidence in support of its claim. The prayers, on both sides, brought the question of the constitutionality of the acts before the Court, and all the judges decided that they were constitutional.

By the twenty-fifth section of the act of 1789, when such a question arises and is decided by a State Court against the party who claims under it, this Court is bound to consider it. By the second section of the act of February 5, 1867, all the provisions of the twenty-fifth section of the original act are re-enacted, except the one in the last clause of the section, which limits this Court to the decision of the Federal question alone.

What change, if any, was made by the act of 1867, because of the omission of that clause, was a matter of doubt until the decision of the motion to dismiss the writ of error in this case, and in the case of Murdoch vs. Memphis, decided at this term. In this last case the Court has held (and on that the Court was unanimous,) that the effect of the act of 5th February, 1867, was totally to repeal the twenty-fifth section of the act of 1789. A majority of the Court was of opinion, that although the Court might hold that the Federal question had been incorrectly decided, they would not reverse the judgment unless they were also of opinion that its correctness depended upon the decision of the Federal question. Three of the judges, however, thought that where this Court differed from the Court below on the Federal question, they should proceed to decide the whole case.

All the Judges concurred in the opinion that the Federal question must be decided. And this, independent of the opinion already pronounced, is very obvious. The meaning of the second section of the act of February, 1867, is very clear. As far as this case is concerned, the words are: "Where is drawn in question, the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution of the United States," the judgment may be

affirmed or reversed by the Supreme Court of the United States upon writ of error. Under this act all the Court seem to have been of opinion that they must decide upon the validity of the statute, whatever might be the effect of their decision upon the judgment. As far as that point is involved, the Court holds that it must decide upon the Federal question, and that, if it was erroneously decided by the Court below, it must reverse the judgment, unless that judgment is supported by reasons wholly irrespective of the Federal question, and, that to decide this, this Court must look into the whole case. But, if they find that the Federal question was erroneously decided, and had controlling influence over the case, then, they will reverse the judgment and render such a judgment as they think the Court below should have rendered, or remand the case to the Court below that it may render such a judgment.

I proceed, now, to inquire whether the acts in question are constitutional.

The case argued a few days since, presented for your decision the authority of the United States by legislation to interfere with the authority of the States. The present case brings before you the authority of the States to interfere by legislation with rights secured to citizens of the United States by the Constitution, or with one of the powers vested in the United States by the Constitution.

What those rights are, and what that power is, are now judicially ascertained

First, as to rights. By the decision of Chief Justice Taney in the "Passenger Cases," in 7th Howard, and by that of the Court in the case of "Crandall vs. Nevada," in 6th Wallace, it was adjudged that a citizen of the United States has a right to pass through, by the ordinary roads of travel, every State of the Union without being liable to State taxation. The minority of the Court in the latter case was of opinion that the Nevada Act was unconstitutional under the "commercial clause," but,

although the majority place their decision upon the grounds I have just stated, they did not hold that it was not also inhibited by that clause, and I have no doubt they are of opinion that it is. Certainly, this is the view entertained by Mr. Justice Miller and the two Justices who concurred with him in their dissenting opinion in the case of "Reading Railroad Company vs. Pennsylvania." (15th Wallace, 297.)

The Constitution in vesting in this Court the authority, when a case is properly before it, to pass upon all questions involving the rights or jurisdiction of the General Government, which State legislation may attempt to defeat or impair, or the rights or jurisdiction of State Government, which Congress by its legislation may attempt to defeat or impair, did what was absolutely necessary to secure the harmonious operation of both Governments. And, indeed, it is not too much to say that without such a provision our Union would have had but a temporary existence and would have fallen into ruin through its inherent weakness. The evidence of this is to be found not only by reasoning from the nature of such governments as ours but from our history during the Confederation. In that period conflicting legislation by the States, as against each other, was of frequent occurrence, and these conflicts were so serious and evidently so fatal in their consequences, as to impress upon every thoughtful and patriotic mind the necessity of having a government endowed with powers entirely competent to prevent or annul them. This necessity, more than any other cause, produced the Constitution, and since the existence of the present government, the States, under the erroneous belief that it would benefit them, individually, have often passed laws of almost equally fatal tendency with those passed during the Confederation, but, they have been rendered harmless by the enlightened and conservative influence of this tribunal. Nothing is more obvious than that a collision between the United States and the States—or between the States themselves—would,

necessarily, be pregnant with peril to both Governments. The very purpose of this tribunal, and, it has from the first faithfully discharged the duty, is to avert such peril by keeping the two Governments within their respective domain. This has been strikingly illustrated in all the cases in which the meaning and operation of the commercial clause has been before you, and the wisdom of giving to this Court the jurisdiction in question has been exhibited in almost every case brought here by writ of error, in which the constitutionality of State laws has been decided. Notwithstanding the admitted ability and undoubted integrity of the State tribunals, such is the frailty of our nature that, without being aware of it, their judgments have been influenced to maintain the legislation of their respective States, and, in almost every instance in which this Court has held a State law to be unconstitutional, the same law had been upheld by the unanimous decision of the State judiciary. Such were the cases of McCullough vs. Maryland, in 4th Wheaton; Brown vs. Maryland in 12th Wheaton, the Dartmouth College case in 4th Wheaton, and Gibbons vs. Ogden in 9th Wheaton. The State Court which decided this last case, was at the time, and has been ever since admitted to have been equal in ability to any court in this country or in Europe, and they maintained the validity of the legislation of New York, which secured to Fulton the exclusive right to navigate the Hudson river by steam power. Yet, their decision was reversed by the unanimous judgment of your predecessors, which judgment has never been called into serious question, while its beneficial effect upon Trade and Commerce cannot be overstated, nor the injurious influence on both, which the affirmation of the decision of the State Court would have had, be exaggerated.

I now come directly to the question, whether the Maryland legislation is constitutional?

It has been rather intimated, than seriously contended, that after so long a period had elapsed, the question of its constitu-

tionality cannot now be made. This objection has no support either in principle or on authority. If the acts were unconstitutional at first, they have been so up to the present time, and must be so until the Constitution is changed. The rights of citizens of the United States, or the powers of the Government, cannot be frustrated by the conduct of a State or of any of its chartered companies. The question, then, being open, are not these laws unconstitutional?

I understand that they are supposed to be constitutional upon three grounds. First. That the payment to the State of one-fifth of the amount received for the transportation of passengers upon the Branch road was one of the considerations upon which the Legislature passed the act. Second. That it was in the nature of a bonus. Third. That it was a tax upon the gross receipts of the Company.

Suppose the provision in question did induce the State to pass the law, does that make it constitutional? The proposition that it does, necessarily concedes that if the provision had been found in a distinct act, after the Company's charter was granted, its legality could not be maintained. If this be so, then it is in the power of a State and its corporations to avoid the constitutional inhibitions by making any provision, in conflict with the Constitution, a matter of contract. Such a doctrine as this would place the operation of the restrictions entirely within the power of a State, and, practically, frustrate it. The Constitution is designed to have a full and permanent operation, so as to accomplish its end, and it cannot be defeated by any measure, designed or undesigned, which practically annuls it. These remarks are equally applicable to the second objection, that the provision is in the nature of a bonus. This view, indeed, is in substance, though not in words, liable to the same answer as the first. A bonus may, no doubt, be exacted of a corporation, and may be one of the conditions upon which its charter is granted. But, where the direct and immediate effect of a bonus is to inter-

fere with the rights of citizens, or a power of the General Government, it falls before the paramount authority of the United States. That authority cannot be in any way impaired by any contrivance to which a State or its corporations may resort. In the words of Mr. Justice Miller, in the Nevada case, this Court would be "very reluctant to admit that any form of words," having "the effect to compel every person travelling through the country by the common and usual modes of public conveyance, to pay a specific sum to the State, was not a tax upon the rights thus exercised." And, to quote again from the same learned Justice, in his dissenting opinion in the case in 15th Wallace (p. 299) he tells us that he lays it down as a broad proposition "that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution or toll for the privilege of having their goods transported through that State by the ordinary channels of commerce." Nor, do I understand that any of the Judges differ from Mr. Justice Miller in these respects. They certainly concurred with him in what he said in the case in 6th Wallace, and they did not differ with him in what I have just quoted from 15th Wallace, but were of opinion that the tax in that case was a tax upon the Company's property, and for that reason was one which the State had a right to impose. Now, why is it that the Nevada case does not apply to and control the present one? It is admitted by the counsel for Maryland that it was correctly adjudged. But it is said that it is not like the present case because the former imposed a tax which *it called* a capitation tax. Now, it must be obvious that whether it is such a tax or not cannot depend upon its being designated as such. Whether it is, depends upon the fact whether it is to be paid by each passenger. A capitation tax, according to all lexicographers, is a tax upon the head, in the nature of a poll-tax, and if the purpose or effect of such a tax is to deny or impair the rights of any citizen, it is void. In the Nevada case, the Railroads, Stage Coaches, or

other means of conveyance of passengers into or out of the State were directed to charge and collect for the State, one dollar for every passenger so transported. This tax would certainly have been a capitation tax, if it had not been so called. Now, suppose that if the tax had not been provided for in a separate act, and that the charters granted to the railroad, &c., had stipulated that the Companies should levy and collect a tax of one dollar upon each passenger, would not the mischief have been precisely the same? The rights of the citizen would have been equally interfered with, as was done by the law itself. Such an attempt on the part of Nevada would not have been even a *cunning contrivance*, but, on the contrary, a clumsy evasion of the constitutional restrictions upon her power. No idea of a contract between her and the railroad, &c., could give validity to such a tax. The design of the restriction on State power in such a matter is to secure the rights of the citizen, and this can not be defeated by any statutory language, to which the State may resort. For using the road by the passengers the Company can charge a fare, for itself, to meet its expenses and give a dividend to its stock-holders. That the tax in this case, is a tax upon the passenger is obvious. It is said that *it is not*, because the Company is authorized by charter to charge each passenger for the whole distance from Baltimore to Washington, two dollars and fifty cents; and that when that sum is received, it is received for and on account of, and belongs to the Company. This, I submit, is a clear misapprehension of the law. It is true, that by the 8th section of the act of 1832, the Company is and would be authorized to charge each passenger, a sum not exceeding two dollars and fifty cents for the whole distance between the two cities. But it is equally true, that one-fifth of that sum is charged for and on account of the State, and belonged to the State. The meaning of the section, therefore, is the same as if it had said that the Company might charge two dollars for itself and fifty cents

for the State. The charge, therefore, of that fifty cents, is a tax upon each passenger, and the Company is constituted the agent of the State to collect it. Before this case was decided by the Superior Court of Baltimore, the Company had, as they were authorized to do, reduced the fare to one dollar and fifty cents for the whole distance. As soon as that Court decided that the one-fifth of this amount was unconstitutionally imposed, the Company reduced the fare to one dollar and twenty cents, and this they did because they found that that would yield a sufficient sum to enable them to keep the road in repair, pay all the expenses of working it, and leave a balance adequate for a fair and reasonable dividend among the stockholders. Now, suppose that your Honors hold that this one-fifth is a constitutional tax, what will the Company be obliged to do, in order to avoid loss and to secure a sum sufficient for its own purposes? It must charge thirty cents more, and that thirty cents would not enure to their benefit, but, exclusively to the benefit of the State. That one dollar and twenty cents is a fair charge, looking only to the interests of the Company, is proved by the fact that the competing road, the Baltimore and Potomac, which is not subject to the tax, charges but one dollar and twenty cents. Now, if the thirty cents is added to the fare upon the Baltimore and Ohio Branch Road, it is imposed on each passenger, exclusively for the State, and he is made to pay it for the privilege of passing over the road—a privilege which he would have had by the payment of one dollar and twenty cents, but for the payment of the State tax. There is another provision in the section referred to of the act of 1832, which shows that the one-fifth was intended to be a tax upon each passenger. It is in the stipulation, that, in the reduction of fare which the Company is authorized to make from time to time, the amount which the State is to receive shall not be less than twenty-five cents, "for the conveyance of each person the whole distance between the two cities." This clearly proves that, in the judgment of the State, what the State is to

receive is derived from a specific tax upon each passenger. It is no answer to this view, that the limitation of twenty-five cents which the State is to receive, was, afterwards, in 1852, repealed. That repeal in no way affected, nor was it intended to affect, the character of the tax. It was not intended to surrender the tax, as, no matter what might be the rate of the fare, the State is entitled to one-fifth of that rate, whether less or more than twenty-five cents. And that that fifth is a tax upon the passenger and not upon the Company, is also manifest by the provisions of the act of 1842, chapter 301, which directs that when the interest of the State in the Baltimore and Ohio Railroad Company is purchased, and the terms of sale complied with, the Treasurer of the State is to execute to the Company "a release of the tax of one-fifth of the passage money, on said Washington Branch of the said Railroad." No reasoning from the nature of this imposition is necessary to prove that it is tax, and nothing but a tax, as it is, in terms, so called.

The third ground upon which the constitutionality of the act is maintained is that the tax is upon the gross receipts of the Company. In my judgment, this is a palpable misapprehension. It is certainly not a tax upon the franchise. It is equally certain that it is not, and does not profess to be, a tax upon the gross or nett receipts of the Company, as receipts *belonging to* the Company. I concede that a State may tax a corporal franchise and corporate property, unless it has engaged by contract not to do so. In order to ascertain whether the tax in dispute is a tax upon the franchise or upon the property of the Company, we are to inquire upon whom or upon what does the tax directly fall. That it falls upon the passenger I have endeavored to prove, and think I have satisfactorily done so. That it does not fall upon the property of the Company clearly appears in the fact, that the Company have no interest whatever in the one-fifth. This, the moment it is received, becomes the property of the State; and the Company, as long as it holds it, holds it

as trustee for the State. It has no right to use or appropriate a dollar of it for its own benefit. In order to discover upon what or upon whom a tax falls, you are to determine who or what pays it. When that is ascertained, you, of course, ascertain upon whom or upon what the tax does fall. This was established as a test, in the case of Bank of Commerce vs. New York City, in 2nd Black, and in the subsequent one, known as the "Bank Tax Case," in 2nd Wallace. In each case the law imposing the tax used general terms, and the Court decided, notwithstanding this, that as a portion of the funds of the Bank were invested in United States securities, the tax, as far as it affected those securities, was unconstitutional. In the first case the Court states, that where a State law imposed a tax upon property which it had no authority to tax, the law was invalid, notwithstanding the general phraseology which might be adopted. Or, to use the words of the Court substantially, such a law is unconstitutional, "whether it imposes the tax on United States' stock, *eo nomine*, or includes it in the aggregate of the tax-paying property, to be valued, like the rest, at its worth." This principle is recognized as a sound one, in the case of Reading Railroad Company vs. Pennsylvania, in 15th Wallace, where Mr. Justice Strong, speaking for the Court, announced that "it has been repeatedly held, that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid." In that case the question was whether the tax imposed by the Pennsylvania statute, was a tax upon the Company or its property, or upon the owner of the freight, which had been brought into or carried out of the State. The Court held that it was upon the freight owner, and was void under the "Commercial Clause" of the Constitution, the Company being made only the tax gatherer for the State. In the subsequent case, in the same volume of Wallace, between the same parties, the question involved the constitutionality of an

act of Pennsylvania levying a tax upon the gross receipts of the Railroad Company. The opinion was given by the same learned Judge who gave the one in the previous case, and the judgment was that the tax was Constitutional. It is not for a moment to be supposed that that Judge and those who concurred with him, intended, in the slightest degree, to affect the doctrine established in the prior case. The ground, therefore, upon which the statute in the last case was held to be Constitutional was that it was a tax upon the property of the Company and not a tax upon any subject or any person exempted from taxation by the Constitution of the United States. The language of the Judge is very clear upon this point. It is, that "the tax is laid upon the gross receipts of the Company; laid upon a fund which has become the property of the Company, mingled with its other property, and possibly expended in improvements, or put out at interest."

Upon the whole, then, I submit that the third ground upon which it is asserted that the law in question can be maintained, is unfounded.

I will, now, proceed to consider the second inquiry, which I stated in the opening—whether the judgment of the Court below can stand, upon grounds in no way connected with the constitutional difficulty. Two of the Judges of the Court of Appeals of Maryland, were of opinion that it could not, and that the suit should have been a special action upon the Maryland Acts. The other Judges, however, thought that it could rest upon grounds irrespective of the Federal question, that is to say, upon principles of law with which that question has no connection, and, for this, they principally relied upon the case of Brooks vs. Martin, (2d Wallace.) A few words will, I think, show that that decision does not conclude the present question. In that case, Brooks and Martin entered into a partnership to purchase soldiers' land warrants, authorized to be issued under the Act of Congress of February 16th, 1847. Such a purchase was prohibited. A large number of such warrants

were, however, obtained by the partners and afterwards sold to others, and the title to the land, so acquired, was never disputed.

When the whole matter was closed, Brooks, one of the partners, purchased from Martin, for a small consideration, his share of the assets, and the bill was filed to set the sale aside, upon the ground of misrepresentation and fraud. The fraud was established, and upon that ground the sale was annulled. The only defence on the part of Brooks was that the purchase of the warrants from the soldiers was contrary to public policy and void. The decision being against Brooks in the Court below, was brought on appeal to this Court, and your Honors affirmed the Decree of the Court below, holding that whatever illegality there was in the purchase of the warrants was immaterial. The Court held that, after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms—the results of the contemplated operation completed—a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract.

That case and the one now before your Honors, are, in my judgment, entirely dissimilar. There, there was no necessity to refer to the original agreement to buy soldiers' land warrants. The whole contract had been carried out. The fruits of the contract were in the hands of the partners. There was no one to contest their title to such fruits. The soldiers' lands had been sold, and were in the possession of innocent holders. The only question, therefore, was to whom did the funds in controversy belong. No one had any claim to them but the partners, Brooks and Martin, and the sole question at issue, was whether Brooks had, by fraud, induced Martin to sell out his interest. The Court held, and properly, that in such a dispute, upon no grounds of law or public policy, could a fraud be protected. But, in the present case, the fund in controversy had been im-

properly exacted from the passengers, and, therefore, belonged to them.

I have not time to examine the other cases cited in the arguments of the Counsel for the State, or in the opinions of the Judges in the Court below. I think, they will be found upon examination, not to have any application to the case at Bar.

The Counsel for the State have referred to the great benefits which the Company has received from its original charter of 1826, under which the main stem of the road has been constructed, and the Acts of Assembly under which the Branch road has been made. No doubt these benefits have been great, but they have not enured exclusively to the Company. The large increase of the wealth of the State, caused by the success of the Company on its main stem and the Branch, is known of all men.

Baltimore from being comparatively a village, when the undertaking was first assumed, has now become a Metropolitan City, and is moving on in rapid strides to still greater magnitude. The Treasury of the State, also, has been a large participant in the wealth produced by the road. From its interest in the main stem, it has received from the Company nearly, if not quite, six millions of dollars, while from this passenger tax it has received, from 1835 to 1868, more than three millions. Upon a comparison, therefore, of the pecuniary advantages resulting from the road, the Treasury of the State has received a full share with the stockholders.

Will the Court, now, permit me, in conclusion, to repeat what I said in closing the argument on the part of the accused in the "Grant Parish case,"—that, among the blessings conferred upon us by the Constitution of the United States, no one was so important or vital, as the article under which this Tribunal was organized and given jurisdiction in all cases of law or equity arising under the Constitution, and laws or treaties of the United States? That jurisdiction has kept us

together as one nation. Without it, we should, long since, have been scattered into fragments. This Tribunal may, indeed, be said to be the keystone of the political arch upon which rest all our institutions, Federal and State. Weaken it, and they will all be in peril. Remove or destroy it, and the whole noble fabric will, soon, if not at once, tumble into ruins, and—chaos be again!